Indian Claims Commission

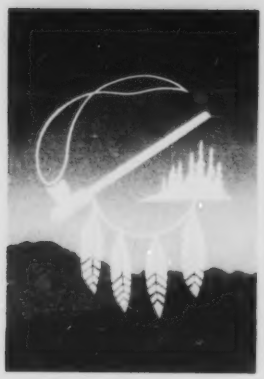
Sumas Indian Band Inquiry

Report On: *1919 Surrender of Sumas Indian Reserve No. 7*

August 1997

Indian Claims Commission

Commission des revendications des Indiens



August 29, 1997

Chief Lester Vernon Ned
Sumas Indian Band

The Honourable Jane Stewart
Minister of Indian Affairs and Northern Development

The Honourable Anne McLellan
Minister of Justice and Attorney General of Canada

RE: Inquiry into Specific Claim of Sumas Indian Band
1919 Surrender of Sumas Indian Reserve No. 7

On March 10, 1995, legal counsel for the Sumas Indian Band wrote to the Indian Claims Commission requesting an inquiry into the Band's rejected claim relating to the surrender of Sumas Indian Reserve No. 7 in 1919. On September 22, 1995, the Commission agreed to conduct an inquiry into this claim pursuant to the federal *Inquiries Act*, and notice of the inquiry was provided to the Sumas First Nation and the Government of Canada by letters dated September 25, 1995.

The Commission has reviewed over 500 pages of historical documents in the course of this inquiry. In addition, the Commission held a combined community session and oral submissions on April 29, 1996, on the Sumas Indian Reserve. On that date, the panel of Commissioners heard oral testimony from elders Hugh Kelly and Ray Silver, and then considered the written and oral submissions of legal counsel for the parties on the question of whether Canada owes an outstanding lawful obligation to the Sumas Indian Band pursuant to the Specific Claims Policy.

Our inquiry into the historical background of this claim, together with our legal analysis, conclusions, and recommendation to the parties is set out in the attached report which we are honoured to present to you on this date.

FOR THE INDIAN CLAIMS COMMISSION

Daniel J. Bellegarde
Commission Co-Chair

Carole T. Corcoran
Commissioner

CANADA

Éd. Enterprise Building, Suite 400 - 427 ouest, av. Laurier Ave. West
P.O. Box/C.P. 1750, Station/Succursale "B", Ottawa, Canada K1P 1A2
Tel (613) 943-2737 Fax (613) 943-0157

INDIAN CLAIMS COMMISSION

SUMAS INDIAN BAND INQUIRY
1919 SURRENDER OF INDIAN RESERVE NO. 7

PANEL

Commission Co-Chair Daniel J. Bellegarde
Commissioner Carole T. Corcoran

COUNSEL

For the Sumas Indian Band
Clarine Ostrove / E. Ann Gilmour

For the Government of Canada
Bruce Becker / Kim Kobayashi

To the Indian Claims Commission
Ron S. Maurice / Kathleen Lickers

August 1997

CONTENTS

PART I	**INTRODUCTION**	1
	BACKGROUND TO THIS INQUIRY	1
	THE MANDATE OF THE INDIAN CLAIMS COMMISSION	3
	THE SPECIFIC CLAIMS POLICY	3
PART II	**HISTORICAL BACKGROUND**	5
	THE SUMAS INDIAN BAND AND ITS RESERVES	5
	USE AND OCCUPANCY OF INDIAN RESERVES 6 AND 7	7
	Map 1: Sumas Indian Reserves No. 6 and No. 7	8
	SALE OF TIMBER ON IR 7	11
	THE SOLDIER SETTLEMENT BOARD AND INTEREST IN SUMAS IR 7	14
	VALUATION OF SUMAS IR 7	15
	SURRENDER NEGOTIATIONS	16
	COMPENSATION FOR IMPROVEMENTS	19
	SALE TO SOLDIER SETTLEMENT BOARD AND REDUCTION IN PRICE	20
	SALE OF IR 7 BY SOLDIER SETTLEMENT BOARD	25
	Map 2: Sumas Indian Reserve No. 7	30
PART III	**ISSUES**	31
PART IV	**ANALYSIS**	33
	SURRENDER PROVISIONS OF THE 1906 *INDIAN ACT*	33
	EFFECT OF TECHNICAL COMPLIANCE WITH THE *INDIAN ACT*	36
	ISSUE 1: FIDUCIARY OBLIGATIONS OF THE CROWN	38
	The *Guerin* Case	41
	The *Apsassin* Case	44
	Pre-Surrender Fiduciary Duties of the Crown	48
	Where a Band Has Ceded or Abnegated Its Power to Decide	48
	Where a Band's Understanding Is Inadequate or The Dealings Are Tainted	52
	Where a Band's Decision to Surrender is Foolish or Improvident	55
	Where Inadequate Compensation Is Paid for Surrendered Lands	58
	ISSUE 2(A): UNDUE INFLUENCE AND DURESS	73
	ISSUE 2(B): ADVANCE ON THE PURCHACE PRICE FOR DISTRIBUTION TO BAND MEMBERS	75
	ISSUE 3: ADVANCE ON THE PURCHASE PRICE BEFORE THE SURRENDER	78
	ISSUE 4: FIDUCIARY OBLIGATIONS AFTER THE SURRENDER	79
	ISSUE 5: ONUS OF PROOF	83

PART V **CONCLUSIONS AND RECOMMENDATIONS** 85

RECOMMENDATION 87

APPENDIX

A Sumas Indian Band Inquiry 89

PART I

INTRODUCTION

BACKGROUND TO THIS INQUIRY

On December 1, 1987, the Sumas Indian Band (the Band) filed a claim with the Specific Claims Branch, Department of Indian Affairs and Northern Development (DIAND), for the alleged wrongful surrender in 1919 of 153.46 acres of land within Indian Reserve (IR) No. 7 for sale to the Soldier Settlement Board. On July 6, 1988, counsel for the Band also brought legal action against the Crown in the Federal Court (Trial Division).

The Band claimed that the Crown owed fiduciary duties to the Band with respect to the management of IR 7 and in relation to the decision to surrender the reserve. The Band asserted that the Crown breached its fiduciary obligations to the Band as follows:

- The Crown knew or ought to have known that the surrender of IR 7 was not in the Band's best interests because the Band was in need of cultivable land.
- The Crown exerted strong pressure on the Band and gave priority to the interests of the Soldier Settlement Board, which requested the land for soldier settlement purposes, over the Band's interests. This resulted in a conflict of interest and a breach of the Crown's fiduciary duty of loyalty to the Band.
- The Crown failed to disclose both its potential conflict of interest and the fact that it intended to transfer the land to the Soldier Settlement Board.[1]

The Band also submitted that the Crown induced Band members to surrender the reserve on October 31, 1919, by applying undue influence and duress and that the Band did not provide an informed consent to the surrender. It therefore submitted that the surrender was an unconscionable transaction and was voidable in equity as a result of the Crown's breach of fiduciary obligation. Alternatively, if the surrender of IR 7 was not voidable, the Band submitted that the Crown breached its fiduciary obligations by acting contrary to the terms of the surrender and the Order in Council accepting the surrender because DIAND agreed in 1923 to forfeit compensation to the Soldier Settlement Board for 13.6 acres of IR 7. Finally, the Band alleged that the Crown breached a fiduciary obligation when

---

[1] Sumas Indian Band, Statement of Claim, Sumas IR 7, December 1, 1987, ICC Exhibit 2, tab 1, pp. 30-31.

it declined to reacquire the surrendered lands from the Soldier Settlement Board once it became known that the land was not suitable for soldier settlement purposes. Based on these alleged breaches of lawful obligation, the Band claimed "damages for past and future loss of use and enjoyment of I.R. #7, and for loss of timber revenue and agricultural revenue arising from the surrender. . . ."[2]

On December 13, 1990, Al Gross, negotiator for Specific Claims West, DIAND, wrote to the Chief and Council of the Sumas Band to inform them that Canada had rejected the Band's claim that the surrender of IR 7 was invalid, but offered to negotiate with the Band on a narrower basis. In particular, Canada agreed that there may have been a breach of duty to the Band when Indian Affairs agreed to reimburse the Soldier Settlement Board for 9.865 acres taken up by the Sumas River within the surrendered lands. DIAND, however, denied that the Crown exerted undue influence and duress on Sumas Band members to procure their consent to the surrender, and maintained that the Band "was made aware of the information available to the Crown, and that the decision to surrender was made on the basis of informed consent. In addition, our view is that the consideration received by the band was fair. . . ."[3] Finally, DIAND stated there was no evidence that the surrendered lands were offered to the Crown for purchase, and, in any event, the Crown was under no fiduciary obligation to reacquire the surrendered lands from the Soldier Settlement Board since the land was no longer a reserve.

On September 23, 1992, the Band's counsel notified Canada that it would be bringing the department's rejection of the claim concerning the wrongful surrender before the Indian Claims Commission (the Commission) for review. At the same time, counsel for the Band submitted further evidence to DIAND in an attempt to convince the department to accept the wrongful surrender claim for negotiation. DIAND responded on November 25, 1992, repeating its willingness to negotiate compensation for refunding a portion of the purchase price to the Soldier Settlement Board, but maintaining that the original surrender was valid.

---

[2] Sumas Indian Band, Statement of Claim, Sumas IR 7, December 1, 1987, ICC Exhibit 2, tab 1, pp. 31-34.

[3] Al Gross, Negotiator, Specific Claims Branch, DIAND, to Chief and Council, Sumas Band Administration, December 13, 1990, ICC Exhibit 2, tab 4.

On June 10, 1993, counsel for the Band responded to DIAND's rejection of the claim by putting forward several additional arguments about the alleged invalidity of the surrender. On September 13, 1993, counsel for the Band was informed that the Department of Justice, counsel for DIAND, had rejected the Band's additional arguments.

On March 10, 1995, Chief Lester Ned of the Sumas Indian Band requested that the Indian Claims Commission conduct an inquiry into the alleged wrongful surrender claim. On September 25, 1995, the Government of Canada and the Chief and Council of the Band were advised that the Commission would conduct an inquiry into the government's rejection of this claim.

THE MANDATE OF THE INDIAN CLAIMS COMMISSION

The Commission derives its authority to conduct inquiries from Order in Council PC 1992-1730. Inquiries are conducted pursuant to the *Inquiries Act* as set out in the Commission issued to the Commissioners on September 1, 1992. Pursuant to its mandate, the Commission is empowered to inquire into, report on, and issue recommendations pertaining to specific claims that have been rejected by Canada. The Commission is authorized as follows:

> AND WE DO HEREBY advise that our Commissioners on the basis of Canada's Specific Claims Policy published in 1982 and subsequent formal amendments or additions as announced by the Minister of Indian Affairs and Northern Development (hereinafter "the Minister") by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report on:
>
> a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister . . .[4]

THE SPECIFIC CLAIMS POLICY

As noted above, under the terms of its mandate the Commission is empowered to report on the validity of claims rejected by the Minister of Indian Affairs "on the basis of Canada's Specific

---

[4] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1992, pursuant to Order in Council PC 1991-1329, July 15, 1991.

Claims Policy." That policy is contained in a 1982 booklet published by DIAND entitled *Outstanding Business: A Native Claims Policy – Specific Claims*.[5]

The main issue between Canada and the Sumas Indian Band concerns whether or not Canada fulfilled its "lawful obligations" to the Band in obtaining the surrender of IR 7. The term "lawful obligation" is set out in *Outstanding Business*:

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
> ii) A breach of obligation arising out of the Indian Act or other statutes pertaining to Indians and the regulations thereunder.
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
> iv) An illegal disposition of Indian land.

Furthermore, Canada is prepared to consider claims based on the following circumstances:

> i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
>
> ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.

The Commission has been asked to inquire into and report on whether the Sumas Indian Band has a valid claim for negotiation pursuant to Specific Claims Policy. This report contains our findings and recommendations on the merits of this claim.

---

[5] DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted in [1994] 1 ICCP 171-85 [hereinafter *Outstanding Business*].

PART II

HISTORICAL BACKGROUND

Part II of this report provides a detailed examination of the historical background in relation to the surrender of Sumas IR 7 on October 31, 1919. In addition to a careful review of the documentary record, which contained over 500 pages of historical documents, the Commission heard oral testimony from elders Hugh Kelly and Ray Silver at a community session convened on the Sumas Reserve on April 29, 1996. The Commission also considered the written submissions of legal counsel for both the Band and Canada before hearing oral argument on the facts and law on April 29, 1996, at the Sumas Reserve. A chronology of the Commission's inquiry and a summary of the documentary record, exhibits, transcripts, and written submissions are set out in Appendix A.

THE SUMAS INDIAN BAND AND ITS RESERVES

The Sumas Band is part of the Stó:lō Nation, a division of the Coastal Salish language group, whose traditional lands are located in the Fraser Valley in British Columbia. Stó:lō means "the river people"; the literal translation of Sumas is "a big level opening." From the time British Columbia entered Confederation in 1871, the question of Indian lands was a contentious issue between the federal and the provincial governments. In 1875, Canada and British Columbia agreed to the formation of a Joint Reserve Commission to address the matter of allotting Indian reserves in the province. The original Joint Reserve Commission consisted of three members, but it was soon dissolved. In its stead, G.M. Sproat was appointed sole Indian Reserve Commissioner in 1878.[6]

Commissioner Sproat visited the Sumas territory in 1879 and set aside a total of 12 reserves for the "Somass River Indians," who, at the time, comprised both the Sumas and Lakahahmen Bands.[7] By an Order in Council dated August 24, 1953, the Sumas and Lakahahmen Bands were formally separated and the reserve lands were divided between the two Bands. Indian Reserves 1 to 5 and 8 to 12 were reserved for the Lakahahmen Band.[8] Only Indian Reserves 6 and 7 were set aside for the exclusive use and benefit of the Sumas Band.

---

6 Robin Fisher, *Contact and Conflict*, 2d ed. (Vancouver: UBC Press, 1992),188-94.

7 Submissions of the Sumas Indian Band, April 16, 1996, p. 1.

8 Memorandum from the Minister of Citizenship and Immigration to the Governor General in Council, August 24, 1953, DIAND file 987/30-0, vol. 1, and Order in Council PC 1953-1314, December 9, 1953 (ICC Documents, pp. 402-04).

In a Minute of Decision dated May 15, 1879, Commissioner Sproat described IR 7, the subject of this inquiry, as "a reserve situate in Township 19 as described on the official plans in the Provincial Land Office as the North West Quarter of Section 6, Township 19, New Westminster District."[9] W.S. Jemmett surveyed IR 7 in 1881 and noted that it was mostly "heavily timbered, the rest a beaver dam."[10] His field notes show the Sumas River dissecting the reserve along with at least two roads – a "wagon road" to Nooksackville with "telegram wires along line across boundary" and another unidentified road north of the bend in the river.[11] There is no acreage figure indicated on either the field notes or the survey plan, but a list of "Reserves established by G.M. Sproat, Indian Commissioner," published in 1885, lists the reserve in the "N.W. 1/4 of section 6, Township 19" as being 160 acres.[12]

In 1909, the Band surrendered 6.53 acres from IR 7 for a right of way for the Vancouver Power Company. The surrender, No. 599, was accepted by Order in Council 2177 on October 28, 1909.[13] This transaction was reflected in the area confirmed as IR 7 by the Royal Commission on Indian Affairs for the Province of British Columbia in 1916. That Commission was established in 1912 to deal with Indian land issues left unresolved after the government of British Columbia withdrew from the previous Reserve Commission in 1908. In September 1912, federal representative J.A.J. McKenna and the Premier of British Columbia, the Honourable Sir Richard McBride, agreed to the establishment of a royal commission "to settle all differences between the Governments of the Dominion and the Province respecting Indian lands and Indian Affairs generally in the Province of

---

9 G.M. Sproat, Indian Reserve Commissioner, Minutes of Decision, May 15, 1879 (ICC Documents, p. 5).

10 William Jemmett, Surveyor, British Columbia, Field Notes, June 1, 1881 (certified correct, April 13, 1886), Field Book B.C. 1129 (ICC Documents, p. 21).

11 William Jemmett, Surveyor, British Columbia, Field Notes, June 1, 1881 (certified correct, April 13, 1886), Field Book B.C. 1129 (ICC Documents, pp. 17-22).

12 W.M. Smithe, Chief Commissioner of Lands and Works, return to an Order of the House, February 28, 1885 (ICC Documents, p. 27).

13 Surrender No. 599, October 9, 1909, in DIAND, Land Registry, No. X015969 (ICC Documents, pp. 43-45), and Order in Council PC 2177, October 28, 1909 (ICC Documents, p. 46).

British Columbia."[14] Subject to the approval of the two levels of government, the Royal Commission on Indian Affairs for the Province of British Columbia (commonly referred to as the McKenna-McBride Commission) had the power to adjust the acreage of Indian reserves in that province. In its report published in 1916, the acreage stated for Sumas IR 7 is 153.46 acres, which takes into consideration the 1909 sale to the Vancouver Power Company (160 acres as originally described minus the 6.53-acre right of way).[15]

USE AND OCCUPANCY OF INDIAN RESERVES 6 AND 7

As previously noted, the Sumas Band was allotted Indian Reserves 6 and 7 as its reserve lands by Commissioner Sproat in 1879. Map 1 on page 8 shows the location of these reserves and other important geographical features of the area. IR 6 consisted of 610 acres at the base of Sumas Mountain, about a mile and a half west of Sumas Lake. This was the location where most members of the Sumas Band chose to establish their homes, orchards, and gardens. Only two band members were reported to have lived on IR 7: Old York, who lived there for a period of time before his death about 1913, when whatever improvements he had made were abandoned by his family;[16] and Gus Commodore, who had a house on IR 6 but moved onto IR 7 in about 1917 to work at a nearby shingle plant.[17]

IR 6 had one major drawback with respect to using the land for agricultural purposes because nearly two-thirds of this reserve was flood plain and not suitable or reliable for large-scale cultivation.[18] IR 7, on the other hand, had the potential to provide good agricultural land because its

---

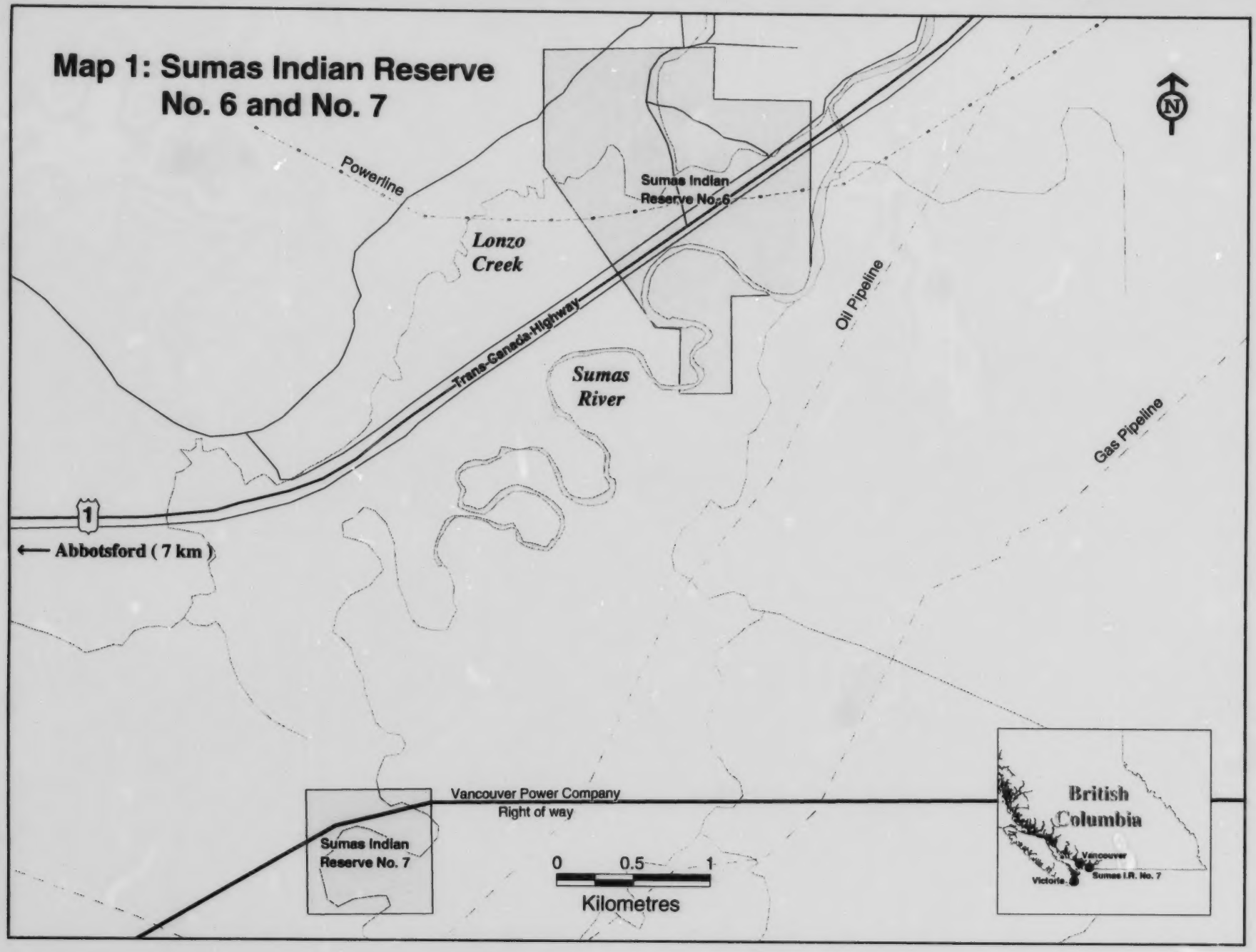
14 McKenna-McBride Memorandum of Agreement, September 24, 1912, in preamble of the *Indian Affairs Settlement Act*, SBC 1919, c. 32.

15 Royal Commission on Indian Affairs for the Province of British Columbia, *Report*, June 1, 1916 (ICC Documents, p. 128).

16 Royal Commission on Indian Affairs, Transcript of Chief Ned's testimony, January 12, 1915 (ICC Documents, pp. 61, 71-73).

17 F.B. Stacey, Member of Parliament, Vancouver, to D.C. Scott, Deputy Superintendent General, April 16, 1919, National Archives of Canada (hereinafter NA), RG 10, vol. 7535, file 26153-1 (ICC Documents, p. 206)

18 ICC Transcript, April 29, 1996, pp. 34-35 (Chief Ned). See also Royal Commission on Indian Affairs, Transcript of Agent Byrne's testimony, February 8, 1916 (ICC Documents, p. 103).


Map 1: Sumas Indian Reserve No. 6 and No. 7
Powerline
Sumas Indian Reserve No. 6
Lonzo Creek
Trans-Canada-Highway
Oil Pipeline
Sumas River
Gas Pipeline
1
Abbotsford (7 km)
Vancouver Power Company
Right of way
Sumas Indian Reserve No. 7
0
0.5
1
Kilometres
N
British Columbia
Vancouver
Victoria
Sumas I.R. No. 7

soil was rich and suitable for cultivation[19] and it was rarely subject to flooding. It was, however, heavily timbered and considerable clearing would have been necessary before it could be used for farming. Chief Ned told the McKenna-McBride Commission in 1915 that clearing and cultivating IR 7 was a future consideration, although he still envisioned that all the people would continue to make their homes on IR 6:

> Q. Would the land [at IR 7] be worth clearing?
> A. The land is very good for cropping and it would be worth clearing for a farming proportion [sic] . . .
> Q. And I suppose the first state to the utilization of that land is to dispose of the timber and sell it?
> A. If we get rid of the cedar we will cultivate the land.
> Q. And there are members of the Band who have no land of their own – is that correct?
> A. I would like to clear my land but we have no money to do much land clearing.
> Q. Are there young men in this band now who have no land that they can cultivate?
> A. These people who live on this reserve [IR 6] they have all places: everyone of them, and they would take additional holdings on the other reserve if we could clear it and sell the timber. This would be their home and they would go there and cultivate some of the land over there.[20]

At the request of the Royal Commission, Peter Byrne, the Indian Agent, approximated the value of IR 7 at $13,000 in 1916 ($12,000 for the land and $1,000 for improvements). This estimate was not made from an on-site inspection of the land but was based primarily on "the value of contiguous properties . . . [and] the best information I could obtain from the Indians."[21] He specifically stated that he did not inspect the timber to estimate its value.

The timber on IR 7 is an important factor in estimating the value of the reserve, but there is conflicting and confusing evidence as to the quantity and value of this resource. In 1903, the Band

---

[19] Royal Commission on Indian Affairs, Transcript of Agent Byrne's testimony, February 8, 1916 (ICC Documents, p. 110).

[20] Royal Commission on Indian Affairs, Transcript of Chief Ned's testimony, January 12, 1915 (ICC Documents, pp. 70-71).

[21] Peter Byrne, Indian Agent, New Westminster, to C.N. Gibbons, Secretary, Royal Commission on Indian Affairs, January 19, 1916 (ICC Documents, pp. 92, 98).

did not consider the retail value of the wood to be high. In response to an Indian Affairs proposal to dispose of the timber on IR 7, the Indian Agent reported that the band members

> were unanimously opposed to surrendering the timber, claiming that the amount likely to be realized from the sale would be so small as to be of little use to them and that they would prefer to cut and dispose of it themselves, and intended shortly to ask permission from the Department to do so. In this way they think they can earn some money with which to make some necessary repairs to their buildings.[22]

Between 1907 and 1914, there were at least four other offers to purchase the marketable timber on the reserve. In 1907, the sum of $2500 was offered for "the merchantable timber."[23] In 1910, a local shingle manufacturer offered $4000 for "only the grown and merchantable" timber – an offer deemed fair by the Department of Indian Affairs employee who made a personal inspection of the reserve.[24] Neither a request to purchase in 1913 that had no stated price, nor another offer in 1914 to pay a 75¢ per cord stumpage fee for cedar to make shingle bolts and also to "take the cottonwood and spruce" at an unspecified price, estimated the quantity of timber that could be harvested.[25] In all these cases, the federal government declined to submit a surrender to the Band "owing to the position taken by the British Columbia Government with regard to Reserves in British Columbia" which was essentially that the province would claim a reversionary right in all reserve lands surrendered by Indian bands.[26] This was one of the problems that the McKenna-McBride Commission was mandated to resolve.

---

22 R.C. McDonald, Indian Agent, New Westminster, to A.W. Vowell, Superintendent of Indian Affairs, British Columbia, November 25, 1903, NA, RG 10, vol. 7330, file 987/20-7-30-6 (ICC Documents, p. 34).

23 C.E. Moulton, Sumas, Washington, to R.C. McDonald, Indian Agent, New Westminster, June 17, 1907 (ICC Documents, p. 36).

24 John McDougall, Department of Indian Affairs, Ottawa, to Deputy Superintendent General of Indian Affairs, January 17, 1910, NA, RG 10, vol. 7330, file 987/20-7-30-6, pt. 1 (ICC Documents, p. 47).

25 Peter Byrne, Indian Agent, to Secretary, Department of Indian Affairs, January 25, 1913 , and J.W. Langs, Langs & Roddis, South Sumas, BC, to J.D. McLean, Secretary, Department of Indian Affairs, May 9, 1914 (ICC Documents, pp. 53, 58).

26 Frank Pedley, Deputy Superintendent General of Indian Affairs, to A.W. Vowell, Superintendent of Indian Affairs for British Columbia, July 9, 1907; J.D. McLean, Assistant Deputy and Secretary of Indian Affairs, to Peter Byrne, Indian Agent, New Westminster, January 31, 1913; McLean to Langs & Roddis, South Sumas, BC, May 19, 1914, all in NA, RG 10, vol. 7330, file 987/20-7-30-6 (ICC Documents, pp. 42, 54, 59).

SALE OF TIMBER ON IR 7

After the completion of the McKenna-McBride Commission's report in 1916, there was renewed interest in the acquisition of the timber from IR 7. In June 1916, P.A. Devoy submitted an offer to Ottawa, both personally and through his Member of Parliament, to purchase the "down and dead" cedar trees on IR 7 to manufacture shingle bolts. He noted that no one was living on IR 7 and that land-clearing activities near the reserve exposed the dry cedar to a risk of fire, which would deprive the Band and the government of revenues from which they might otherwise benefit.[27] The Department of Indian Affairs asked the Indian Agent to report on the quality of the cedar and whether its sale was advisable. The Indian Agent confirmed that the cedar timber was all dead and most of it down, but because the Indians were away picking hops, he had not had an opportunity to discuss the proposed sale with them.[28]

In the meantime, other bids for this timber came in from Thomas Christie and Hubert Gilley, both of whom were engaged in the shingle business.[29] As well, at least one other prospective buyer was dealing directly with the band members. In December 1916, Agent Byrne was asked for information on a report

> that an American citizen, named Whiteside, has been in communication with the Indians of the Sumas Reserve with a view to negotiating with them to obtain cedar on the reserve. It is represented that he has been using money and liquor to obtain their favour. I wish you would be good enough to let me know whether you have any information concerning this or not.[30]

In the same letter, the Agent was again asked to report on the progress of Mr Devoy's application.

---

27 P.A. Devoy, New Westminster, to Deputy Superintendent General of Indian Affairs, June 8, 1916, NA, RG 10, vol. 7330, file 987/28-7-30-6, pt. 1 (ICC Documents, p. 134).

28 Peter Byrne, Indian Agent, New Westminster, to Assistant Deputy and Secretary, Department of Indian Affairs, September 18, 1916, NA, RG 10, vol. 7330, file 987/20-7-30-6, pt. 1 (ICC Documents, p. 137).

29 Thomas W. Christie, Vancouver, to Mr Byrne, Indian Agent, New Westminster, November 16, 1916, and Hubert Gilley, Mgr., Otter Single Company, Otter, BC, to Mr Byrne, Indian Agent, New Westminster (ICC Documents, pp. 139-40).

30 D.C. Scott, Deputy Superintendent General of Indian Affairs, to Peter Byrne, Indian Agent, New Westminster, December 29, 1916 (ICC Documents, p. 142).

With regard to the Devoy offer, Agent Byrne first responded that it had so far been "impossible" to get the Band to consent to this sale, even though the agent considered Mr Devoy's bid of $1.05 per cord to be the highest obtainable and the best offer for any similar timber in that locality. According to Agent Byrne, the Indians seemed "suspicious," and even after other offers were received and it became obvious that Mr Devoy's offer was the highest, the Band still refused to consider favourably the sale of this timber.[31] Three days later the Indian Agent provided information on the Whiteside application and his own discussions with the Band about the sale of this timber:

> I might say that previous to this time, Mr. Devoy had made his offer in writing, which was and is yet the highest quoted, but nevertheless the Indians, for some reason unknown to me, seem to be very anxious to negotiate with Mr. Whiteside's representatives at a lower figure . . .
>
> . . . at the last meeting I held with the Sumas Indians at which I again submitted the tenders for the timber and recommended that they agree to the sale of it they refused to consider the proposition. The amount per cord for stumpage seems to be quite satisfactory to them, but they want more than $1.00 per cord for cutting and delivering the bolts . . .[32]

After receiving advice from the Timber Inspector that an outright sale of the timber would necessitate a formal surrender, valuation, and call for tenders, government officials opted instead to authorize the cutting of the timber by the Band under a permit of sale to Mr Devoy.[33] This proposition was laid before the Band, and by resolution dated January 31, 1917, the Sumas Band Council consented to the sale of the timber to Mr Devoy for the price offered, $1.05 per cord.[34] In addition, the agreement provided:

---

[31] Peter Byrne, Indian Agent, New Westminster, to Assistant Deputy and Secretary, Department of Indian Affairs, January 2, 1917 (ICC Documents, p. 143).

[32] Peter Byrne, Indian Agent, New Westminster, to [Deputy Superintendent General of Indian Affairs], January 5, 1917 (ICC Documents, pp. 144-45).

[33] J.D. McLean, Assistant Deputy and Secretary, to Peter Byrne, Indian Agent, New Westminster, January 11, 1917, NA, RG 10, vol. 7330, file 987/20-7-30-6, pt. 1 (ICC Documents, p. 147).

[34] Resolution signed by Chief Ned, Gus Commodore, and Peter Sylva, Sumas Band, New Westminster, and by P.A. Devoy, January 31, 1917 (ICC Documents, pp. 148-50).

> If the Indians cut the bolts they are to get $1.50 per cord at the stump, and if they cut and haul them, they are to get $3.00 per cord delivered in the water at a certain point. In addition Mr. Devoy is to pay the usual dues at tariff rates to the Department [75 cents per cord] and 30 cents per cord to the Indians of this band.[35]

According to the royalty statements and scaling returns submitted by the Indian Agent, a total of 1730.3 cords[36] were harvested under this agreement between April 1917 and March 1918.[37] A total of $1298.49 was remitted to the Department of Indian Affairs on account of this timber, made up entirely of the $0.75 per cord stumpage rate. There is no record of how much money might have been distributed to individual band members for either the $0.30 per cord fee stipulated in the agreed terms or the extra wages paid for cutting and hauling.[38]

It is not clear how extensively IR 7 was logged under the permit for sale to Mr Devoy, since the various reports estimating the quantity of timber on the reserve used different units of measurement.[39] Without this information, it is impossible to know whether the presence of any marketable timber added to the value of IR 7 when it was later surrendered and sold.

---

[35] Peter Byrne, Indian Agent, New Westminster, to D.C. Scott, Deputy Superintendent General of Indian Affairs, February 2, 1917, NA, RG 10, vol. 7330, file 987/20-7-30-6, pt. 1 (ICC Documents, p. 151), and Resolution signed by Chief Ned, Gus Commodore, and Peter Sylva, Sumas Band, New Westminster, and by P.A. Devoy, January 31, 1917 (ICC Documents, pp. 148-50).

[36] "Cord: any of various units of quantity for wood cut for fuel or pulp; esp: a unit equal to a stack 4 x 4 x 8 foot or 128 cubic feet." *Websters Third International Dictionary* (Springfield, Mass.: G. & C. Merriam Company, 1968). However, we have been unable to ascertain exactly how this term was used by the different parties involved in the timber transactions, thereby rendering its use as a unit of measurement unreliable.

[37] The figure of "1730.3 cords" is taken from the Band's Specific Claim submission (ICC Exhibit 2, tab 1, p. 7). The copies of the various royalty statements and scaling returns submitted to the Commission are not always legible, so it is difficult to verify this number.

[38] "Specific Claims Branch Review, Sumas Band Specific Claim, Surrender of Sumas IR 7 in 1919," p. 16, [no date], in Sumas Indian Band, Statement of Claim, Sumas IR 7 tab 2 (ICC Exhibit 2).

[39] J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to Peter Byrne, Indian Agent, New Westminister, June 15, 1916; Byrne to Assistant Deputy and Secretary, Department of Indian Affairs, September 18, 1916; and H.J. Bury, Timber Inspector, Lands & Timber Branch, Department of Indian Affairs, to Deputy Superintendent General of Indian Affairs, Ottawa, January 10, 1917, NA, RG 10, vol. 7330, file 987/20-7-30-6 (ICC Documents pp. 136, 137, 146).

THE SOLDIER SETTLEMENT BOARD AND INTEREST IN SUMAS IR 7

The Soldier Settlement Board was established in accordance with the *Soldier Settlement Act, 1917*,[40] and the *Soldier Settlement Act, 1919*.[41] It was characterized as "a body corporate, and as such, the agent of the Crown in the right of the Dominion of Canada."[42] Its purpose was to provide assistance to soldiers returning from active service in the First World War who wanted to take up farming. Its primary responsibility was to secure farming land for returning soldiers at reasonable cost. To that end, it was empowered to acquire land from various sources, including surrendered Indian reserves:

> The Board may acquire from His Majesty by purchase, upon terms not inconsistent with those of the release or surrender, any Indian lands which, under the *Indian Act*, have been validly released or surrendered.[43]

On April 16, 1919, F.B. Stacey, a Member of Parliament who was temporarily attached to the Vancouver office of the Soldier Settlement Board, informed Duncan Campbell Scott, the Deputy Superintendent General of Indian Affairs, that eight returned soldiers had applied to homestead the "unoccupied" Sumas IR 7. Mr Stacey had inspected the reserve and reported:

> The soil is good, land nearly all wooded but not with heavy stuff and can be cleared at a medium cost. On the Reserve is a half breed squatter, also an Indian by the name of Commodore, with a wife and three children, who has a house and land on another Reserve, but moved over here some two years ago to work in a shingle mill that was in operation. He says that Mr. Byrne told him he could stay there, but of course I do not suppose Mr. Byrne could or would make any official promise to that effect. The Indian (Commodore) is cutting a little wood and selling it, *but there should be no difficulty in removing him and opening up the land to the eight soldiers*.[44]

---

[40] *An Act to assist Returned Soldiers in settling upon the Land and to increase Agricultural production*, 7-8 George V, 1917, c. 21 (ICC Documents, pp. 152-55).

[41] *Soldier Settlement Act*, 9-10 George V, 1919, c. 71 (ICC Documents, pp. 224-41).

[42] *Soldier Settlement Act, 1919*, 9-10 George V, 1919, c. 71, s. 4(1) (ICC Documents, p. 226).

[43] *Soldier Settlement Act, 1919*, 9-10 George V, 1919, c. 71, s. 10 (ICC Documents, p. 226).

[44] F.B. Stacey, Soldier Settlement Board (hereinafter SSB), Vancouver, to D.C. Scott, Deputy Superintendent General of Indian Affairs, April 16, 1919, NA, RG 10, vol. 7535, file 26153-1 (ICC Documents, p. 206). Emphasis added.

VALUATION OF SUMAS IR 7

Following Mr Stacey's request to make Sumas IR 7 available to the Soldier Settlement Board, a Department of Indian Affairs official reported to the Deputy Minister that the reserve in question measured 153.46 acres and was valued at $13,000[45] (the same value assigned by Agent Byrne for the McKenna-McBride Commission hearings three years previously). This sum translates into a per acre value of $84.71.

On April 25, 1919, the Department instructed Agent Byrne to "meet Mr. Stacey and agree upon a fair and reasonable valuation for this reserve."[46] On the same day, Deputy Superintendent General Scott informed the Chairman of the Soldier Settlement Board that those instructions had been sent, and assured him that, "if your Board decides to obtain the land at that valuation I will at once endeavour to secure a surrender from the Indians for the purpose of soldiers' settlement."[47]

Agent Byrne reported that he travelled to the reserve on May 3, "consulted with the Indians in regard to them giving a surrender of this land," and "also went over the ground and carefully examined the nature of the soil, etc."[48] According to Agent Byrne's report, he met with Mr Stacey two days later and they agreed on a price for the reserve lands: "[W]e decided that Eighty Dollars ($80.00) per acre was a just and fair value to place on the land in this Reserve, after deducting the right-of-way for the B.C. Electric Railway, and for the Highways passing through it."[49] For his part, Mr Stacey considered that IR 7 was a "good buy" at $80 per acre: the timber was second growth and small and could be cleared at $50 per acre, the British Columbia Electric station was "right at the

---

45 Henry Fabien, Department of Indian Affairs, Ottawa, to Deputy Minister, April 24, 1919 (ICC Documents, p. 207).

46 D.C. Scott, Deputy Superintendent General of Indian Affairs, to Peter Byrne, Indian Agent, New Westminster, April 25, 1919, NA, RG 10, vol. 7535, file 26,153-1 (ICC Documents, p. 209).

47 D.C. Scott, Deputy Superintendent General of Indian Affairs, to W.J. Black, Chairman, Soldier Settlement Board, Ottawa, April 25, 1919, NA, RG 10, vol. 7535, file 26153-1 (ICC Documents, p. 208).

48 Peter Byrne, Indian Agent, New Westminster, to D.C. Scott, Deputy Superintendent General of Indian Affairs, June 4, 1919, NA, RG 10, vol. 7535, file 26153-1 (ICC Documents, p. 219).

49 Peter Byrne, Indian Agent, New Westminster, to D.C. Scott, Deputy Superintendent General of Indian Affairs, June 4, 1919, NA, RG 10, vol. 7535, file 26153-1 (ICC Documents, p. 219).

door," and the soil was especially suited to cultivating vegetables and fruits.[50] Indeed, the price agreed to was less than he would have offered or what Indian Agent Byrne thought it was worth. As Soldier Settlement Board Commissioner E.J. Ashton noted, Mr Stacey

> had been ready to recommend a price of $85.00 per acre, for this, but he considered $80.00 per acre a good price for it.
>
> Mr. Byrnes [sic] who valued the land with him considered it worth $100.00 per acre, which, Mr. Stacey informs me, is the opinion of the settlers in the vicinity of this reserve.[51]

On July 3, 1919, the Board accepted the valuation of $80 per acre and asked the Department of Indian Affairs to negotiate for the surrender of the land (160 acres "less the land held by the British Columbia Electric Railway") at this price.[52]

SURRENDER NEGOTIATIONS

When the Soldier Settlement Board first approached Indian Affairs in April 1919 with the request to purchase Sumas IR 7, the Deputy Superintendent General asked the Agent's "opinion on the feasibility of obtaining a surrender."[53] Agent Byrne did not reply until June, when he reported that he had gone to the Sumas Reserve on May 3, consulted the Indians, and found them "divided in regard to this surrender, some are inclined to favourably consider it, while others strongly object, and it is doubtful if the consent of the majority can be obtained."[54]

In July, when the Soldier Settlement Board agreed to the price set by Agent Byrne and Mr Stacey, the Agent was officially authorized to submit the surrender to the Band, according to the

---

50 E.J. Ashton, Commissioner, SSB, to W.J. Black, Chairman, SSB, June 14, 1919 (ICC Documents, p. 221).

51 E.J. Ashton, Commissioner, SSB, to Mr Black, Chairman, SSB, July 3, 1919 (ICC Documents, p. 222).

52 E.J. Ashton, Commissioner, SSB, to D.C. Scott, Deputy Superintendent General of Indian Affairs, July 3, 1919, NA, RG 10, vol. 7535, file 26,153-1 (ICC Documents, p. 223).

53 D.C. Scott, Deputy Superintendent General of Indian Affairs, to Peter Byrne, Indian Agent, New Westminster, April 25, 1919, NA, RG 10, vol. 7535, file 26,153-1 (ICC Documents, p. 209).

54 Peter Byrne, Indian Agent, New Westminster, to D.C. Scott, Deputy Superintendent General of Indian Affairs, June 4, 1919, NA, RG 10, vol. 7535, file 26,153-1 (ICC Documents, p. 219).

provisions of the *Indian Act*. He was sent the necessary surrender forms along with "a cheque for the sum of $4500 to be distributed on a per capita basis to the Indians at the rate of $100 each, provided the surrender is granted by the Indians."[55] On the same day, the Deputy Superintendent General asked the Board to advance this amount "on account of the purchase price and for distribution after the vote is taken, should the Indians agree to surrender."[56] The Board forwarded the money immediately.

This per capita distribution was permissible under the *Indian Act*, which allowed for a "sum not exceeding fifty per centum of the proceeds of any land" to be paid to the members of a band at the time of surrender.[57] The $4500 advanced by the Soldier Settlement Board was less than 50 per cent of the expected proceeds (153.6 acres sold at $80 per acre amounts to $12,288, half of which is $6144). Four years after the surrender, in May 1923, the Band requested and received the balance of 50 per cent of the proceeds of the sale for distribution on a per capita basis to Sumas Band members.[58] No evidence was submitted to demonstrate how often, or in what manner, the Department of Indian Affairs made use of this 50 per cent cash advance in negotiating surrenders involving other Indian bands.

In the case of the Sumas IR 7 surrender, the money was sent to the Agent after only one report that the Indians were reluctant to sell the lands. When the Agent acknowledged receipt of the surrender forms and the advance money on July 25, 1919, he indicated that he thought that it was "going to be a very slow job as these Indians are very hard to do business with."[59] He did not report again until requested to do so in September, at which time he again indicated the Band's reluctance to surrender, but gave no details about their reasons:

---

55 D.C. Scott, Deputy Superintendent General of Indian Affairs, to Peter Byrne, Indian Agent, New Westminster, July 16, 1919, NA, RG 10, vol. 7535, file 26153-1 (ICC Documents, p. 243).

56 D.C. Scott to Major E. Ashton, Commissioner, SSB, July 16 and July 18, 1919 (ICC Documents, pp. 246-47).

57 RSC 1906, c. 81, s. 89.

58 A. O'N. Daunt, Indian Agent, New Westminster, to Assistant Deputy and Secretary, Department of Indian Affairs, May 2, 1923, and J.D. McLean to Daunt, May 17, 1923, NA, RG 10, vol. 7535, file 26153-1 (ICC Documents, pp. 351-52).

59 Peter Byrne, Indian Agent, to Assistant Deputy and Secretary, Department of Indian Affairs, July 26, 1919, NA, RG 10, vol. 7535, file 26153-1 (ICC Documents, p. 249).

> I regret to state that, up to the present, I have been unable to obtain a surrender of Reserve No. 7 of the Sumas Band of Indians, although I have approached these people on various occasions.
>
> Only two days ago I again interviewed the Chief and he told me that he would get his people together to try and have them consent to giving the surrender, as desired by you.[60]

A little more than a month later, Agent Byrne reported on October 31, 1919, that the Band had consented to the surrender. According to Agent Byrne's report, all nine band members on the voters' list attended the meeting and voted in favour of the surrender. The surrender document was executed by eight members of the Band. The surrender stipulated that all of IR 7, comprising 153.5 acres, was surrendered to the King, his Heirs and Successors forever:

> . . . in trust to dispose of the same to the Soldier Settlement Board at the rate of Eighty dollars per acre, upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people.
>
> And upon the further condition that all moneys received from the disposition thereof, less amount to be distributed to the members of the Band, shall be placed to our credit and interest thereon paid to us, in the usual way.[61]

With the signed surrender form, the Agent included the voters' list, the paylist showing the distribution of the advance money, and the sworn certification of both the Agent and the Chief and principal men of the Band that the surrender was taken in accordance with the terms stipulated in the *Indian Act*.[62] This last document includes a declaration that the terms of the surrender were translated to the voting members by an interpreter qualified to interpret from the English language to the language of the Band.[63] This is the only evidence we have that an interpreter was present at the surrender meeting. However, it is evident from the testimony of elder Hugh Kelly before the

---

60 Peter Byrne, Indian Agent, to D.C. Scott, Deputy Superintendent General of Indian Affairs, September 20, 1919, NA, RG 10, vol. 7535, file 26153-1 (ICC Documents, p. 251).

61 Surrender, October 31, 1919 (ICC Documents, pp. 253-54).

62 Surrender, October 31, 1919, with affidavit and voters' list; Peter Byrne to D.C. Scott, November 1, 1919 (ICC Documents, pp. 253-58).

63 Affidavit, October 31, 1919 (ICC Documents, p. 255).

Indian Claims Commission that many Sumas people could read and write English in the relevant time period.[64]

What is absent from these documents is an explanation why members of the Sumas Band suddenly changed their position and agreed to a surrender. There is no evidence of what was discussed at meetings with the Indian Agent or among the Band members themselves. We know only that, in a period of approximately one month, the possibility of the Department of Indian Affairs obtaining a surrender from the Band went from being unlikely to a successful endeavour.

The surrender of Sumas IR 7 was accepted by Order in Council dated November 15, 1919.[65]

COMPENSATION FOR IMPROVEMENTS

Because most members of the Sumas Band chose to make their homes on IR 6, there were few improvements on IR 7 to consider. In 1916, the McKenna-McBride Commission heard evidence that Old York was the only band member who had ever had a house and clearing on Sumas IR 7, but he had died some two years previously and his family had failed to maintain the property. Even so, the Agent had, at that time, placed a value of $1000 on these improvements.[66] In April 1919, F.B. Stacey reported that the only occupants of Sumas IR 7 were a "halfbreed squatter, also an Indian by the name of Commodore, with a wife and three children who own a house and land on another Reserve, but moved here some two years ago to work in a shingle mill that was in operation."[67]

When Agent Byrne acknowledged his instructions to put the surrender before the Band in July 1919, he reported that "there are some small patches of clearing on this Reserve, belonging to

---

[64] ICC Transcript, April 29, 1996, pp. 15-16, 19 (Hugh Kelly).

[65] Order in Council dated November 15, 1919, NA, RG 10, vol. 7535, file 26,153-1 (ICC Documents, p. 263).

[66] Peter Byrne, Indian Agent, New Westminster, to C.N. Gibbons, Secretary, Royal Commission on Indian Affairs, January 19, 1916 (ICC Documents, pp. 92, 98).

[67] F.B. Stacey, SSB, Vancouver, to D.C. Scott, Deputy Superintendent General of Indian Affairs, April 16, 1919, NA, RG 10, vol. 7535, file 26153-1 (ICC Documents, p. 206).

individual Indians and I will endeavour to make arrangements with them for their improvements."[68] Afterwards he submitted two claims:

> I am submitting herewith, a claim of Chief Ned and also a claim of Gus Commodore for compensation for improvements by them on the Reserve, which the band have surrendered. Each one is asking for the sum of $200.00 which I think is a fair and just price, for the work done by them. If it is not possible to get this money from the parties, who intend to acquire the Reserve, I would respectfully recommend that it be taken from the band funds, as both of these men have worked hard to assist me in obtaining the surrender.[69]

Since the price proposed to the Soldier Settlement Board for Sumas IR 7 did not include any additional amounts for improvements, officials in the Lands and Timber Branch were of the opinion that any such compensation must be paid from the proceeds of the sale. The Agent was therefore instructed to submit vouchers in the usual manner and both Chief Ned and Gus Commodore were paid $200 from the Band's trust account on November 24, 1919.[70]

Sale to Soldier Settlement Board and Reduction in Price

In its submission to the Governor General in Council on November 24, 1919, the Department of Indian Affairs asked that Sumas IR 7 be transferred to the Soldier Settlement Board "on the understanding that the balance of the purchase price will be paid on transfer of the title.."[71] On December 1, 1919, Order in Council PC 2421 transferred 153.5 acres of Sumas IR 7 to the Soldier Settlement Board, which paid the outstanding balance of $7780 on December 19, 1919 (the balance

---

[68] Peter Byrne, Indian Agent, to Assistant Deputy and Secretary, Department of Indian Affairs, July 25, 1919, NA, RG 10, vol. 7535, file 26,153-1 (ICC Documents, p. 249).

[69] Peter Byrne, Indian Agent, to D.C. Scott, Deputy Superintendent General of Indian Affairs, November 1, 1919 (ICC Documents, p. 258).

[70] W.A. Orr, Officer in Charge, Lands and Timber Branch, to Deputy Minister, November 8, 1919 (ICC Documents, p. 261), and Vouchers 443 and 444, November 24, 1919, NA, RG 10, vol. 7535, file 26153-1 (ICC Documents, pp. 268-71).

[71] Arthur Meighan, Superintendent General of Idian Affairs, to the Governor General in Council, November 24, 1919 (ICC Documents, pp. 266-67).

was calculated on the basis of 153.5 acres at $80 per acre, which equals $12,280 less the $4500 advanced before the surrender).[72]

The Department of Indian Affairs then proceeded to prepare the Letters Patent to transfer title of these lands to the Soldier Settlement Board. In March 1920, the officials in Ottawa contacted Agent Byrne requesting information about a telegraph line through the reserve, shown on the township plan but not on any survey, as well as any public highways or roads through the reserve.[73] Agent Byrne replied that a public road passed through IR 7 "following the line indicated on the original survey of this Reserve, which was then known as the Nooksackville road. There is a telegraph line on this road. This is the only telegraph line on the Reserve, besides that on the B.C. Electric Railway's right of way, which also passes through the reserve."[74]

The Letters Patent that the Soldier Settlement Board received on April 17, 1920, did not include this public road. The actual patent was not submitted as evidence in this inquiry, but a memorandum prepared for the Deputy Minister in June 1920 indicated that the Board received only about 150 acres in their deed since "3.46 acres was taken off for the public road. The area inserted in the Description for Patent was 150 acres more or less . . ."[75]

Having received the patent, the Soldier Settlement Board issued instructions to its Vancouver office to subdivide the land and set sale prices, bearing in mind that the Board was required to recoup the total purchase price plus surveying and other incidental costs.[76] The subsequent detailed inspection and survey made Board officials question whether they could, in fact, recover their costs:

---

72 Order in Council PC 2421, December 1, 1919, NA, RG 10, vol. 7535, file 26,153-1 (ICC Documents, pp. 272-73), and E. Ashton, Commissioner, SSB, to Deputy Superintendent General of Indian Affairs, December 19, 1919, NA, RG 10, vol. 7535, file 26,153-1 (ICC Documents p. 279).

73 J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to P. Byrne, Indian Agent, March 1, 1920 (ICC Documents, p. 285).

74 Peter Byrne, Indian Agent, to Assistant Deputy and Secretary, Department of Indian Affairs, March 26, 1920 (ICC Documents, p. 286).

75 Donald Robertson, Department of Indian Affairs, Ottawa, to Deputy Minister of Indian Affairs, June 29, 1920 (ICC Documents, p. 308).

76 Assistant Secretary, [SSB], to District Superintendent, SSB, Vancouver, April 14, 1920 (ICC Documents, p. 290).

> There is no question but that the Board has paid altogether too much money for the land. Our records here will show that we seldom pay in excess of forty or fifty dollars per acre for uncleared land anywhere in the Fraser Valley. The cost of clearing, however, varies, but from what you yourself have seen on this Reserve, you will know that while portions may be cleared at $100. per acre or less, other portions will cost in excess of $150. per acre.
>
> Considering the Board's policy in regard to placing men on uncleared lands, I do not see how we could attempt to effect a sale of this Reserve unless the price was well within what the land is actually worth in its present state. . . .[77]

According to the Vancouver District Superintendent of the Soldier Settlement Board, the land was not worth more than $50 an acre.[78]

The subdivision survey also calculated that there were only 135.9 useable acres available for soldier settlement, as opposed to the 153.5 acres purchased. The Board argued that it should not have had to pay for approximately 7 acres taken up by roads through the reserve and the river, which occupied about 10 acres. An internal legal opinion prepared for the Board advised that despite this reduction in the acreage available for settlement purposes, the Board was legally required to pay for all the property enclosed by the reserve.[79] Despite this legal opinion, the Board decided to "discuss this matter further with the Department of Indian Affairs, with a view to paying only for the actual acreage as disclosed by the sub-division. . . ."[80] Chairman Black of the Soldier Settlement Board wrote to the Deputy Superintendent General, stating:

> . . . I find the road clearly marked on the Township Plan and also on Plan submitted to me by the Board's representative at Vancouver, on the latter it being described as Whatcom Road. It therefore appears that the same has either by use or grant become dedicated to the public and as such was not available for transfer to us, and we could not incorporate it into the farm, should we desire to do so.

---

77 District Superintendent, SSB, Vancouver, to Director of Lands and Loans, SSB, Ottawa, May 7, 1920 (ICC Documents, p. 302).

78 District Superintendent, SSB, Vancouver, to Director of Lands and Loans, SSB, Ottawa, May 7, 1920 (ICC Documents, p. 302).

79 Assistant Commissioner, SSB, to W.J. Black, Chairman, SSB, June 25, 1920 (ICC Documents, p. 305).

80 District Superintendent, SSB, Vancouver, to Director of Lands and Loans, SSB, Ottawa, May 7, 1920 (ICC Documents, p. 305).

> The area embraced by the Sumas River, practically 10 acres, is considerable and obviously cannot be utilized by us.
>
> In view therefore of the circumstances and the comparatively large sum involved in relation to the total purchase price, may I request that you take the matter into consideration with a view to possible adjustment? . . .[81]

On receipt of this request, the Department of Indian Affairs generated a report on Sumas IR 7. The Surveys Branch reported to the Deputy Superintendent General that, "if the Department is disposed to make any refund to the Board," the area might be reduced to 145 acres:

> In the present case the original township plans show the area of the quarter-section to be 160 acres, the river apparently not being considered large enough to be deducted and on the latest township plan issued and confirmed by the Surveyor General, the measurements of the quarter-section are shown such as to make the area 160 acres; the river shown as not having been traversed. The river therefore was not considered in making the description for patent and the basic area of 160 acres was taken. Order in Council dated 25 January, 1913 confirmed this reserve as 160 acres. From this an area of 6.54 acres was deducted for the Right of Way of the Vancouver Power Company and 3.46 acres was taken off for the public road. The area inserted in the Description for Patent was 150 acres more or less, the river not being deducted for reasons as above stated.[82]
>
> No plan of the public road has been filed with the Department and it is doubtful if a survey of it has ever been made. Its position on our plan of the reserve shows it to occupy about 3.5 acres of the reserve. The agent confirmed this position by stating the road to be approximately as shown on the plan of the reserve. The area of the river as shown on the Township plan would be 5 acres (approximately). Of course there may be steep banks receding from the high water mark which would double this amount but this additional amount should not be included in any area allowed for the river.
>
> Allowing 5 acres for the river and amounts as stated for the Right of Way and road, the remaining area would be 145 acres and if the Department is disposed to make any refund to the Board, I consider they should be charged for 145 acres unless they are prepared to supply a plan of survey of the river and the road made by a Dominion Land Surveyor, showing tha. the amount of land covered by the road and the actual river bed is greater than that allowed above. The area in patent should not

---

[81] W.J. Black, Chairman, SSB, to D.C. Scott, Deputy Superintendent General of Indian Affairs, June 25, 1920, NA, RG 10, vol. 7535, file 26,153-1 (ICC Documents, p. 306).

[82] Neither the description for patent nor the patent itself was included in the documents submitted to the Commission.

> be changed as the wording "150 acres more or less" agrees with any information the Registrar may have.[83]

On July 2, 1920, the Deputy Superintendent General offered to reduce the area to 145 acres and to refund $680 to the Soldier Settlement Board, but stated that no further reduction would be considered without a detailed survey plan to substantiate the reduced acreage figures.[84] The Board responded two and a half years later, in January 1923, that it wished to rely on the 135.9 acres shown on a detailed survey plan conducted by Provincial Land Surveyor A.E. Humphrey in April 1920 when the land was originally subdivided. The Board did not think that it should have to undertake the additional work and expense of having another survey conducted. Additionally, the Board pointed to the fact that $80 an acre had been a very good price because, despite being extensively advertised, only a small portion had been sold.[85]

W.R. White of the Department of Indian Affairs found that the area of the lots on Humphrey's survey were accurate, but he did not agree with the Board's argument about the roads. If the Department felt the area of the river should be excluded, he still recommended that the Board be required to pay for at least 139.9 acres:

> [T]he roads along the North and West boundaries containing approximately 4 acres, were laid out by the Soldier's Settlement Board and would not have been required for the purposes of this Department. The river, which occupies an area of 9.865 acres, although not usually excepted when the width is so small as about 50 feet, might be deducted if found expedient. I think that the 4 acres included in the road along the North and West boundaries should in any case be paid for, making a total of 139.9 acres.[86]

---

[83] Donald Robertson, Department of Indian Affairs, Ottawa, to Deputy Minister, June 29, 1920 (ICC Documents, p. 308).

[84] D.C. Scott, Deputy Superintendent General of Indian Affairs, to W.J. Black, Chairman, SSB, July 2, 1920, NA, RG 10, vol. 7535, file 26,153-1 (ICC Documents, p. 309).

[85] Secretary, SSB, to D.C. Scott, Deputy Superintendent General of Indian Affairs, January 23, 1923, NA, RG 10, vol. 7535, file 26,153-1 (ICC Documents, pp. 330-31).

[86] W.R. White, Department of Indian Affairs, Ottawa, to Lands Branch, January 27, 1903, NA, RG 10, vol. 7535, file 26,153-1 (ICC Documents, p. 332).

The Acting Deputy Superintendent General then contacted the Board proposing that 139.9 acres be accepted, with the Department of Indian Affairs agreeing to except the river area, and the Board agreeing to pay for the road allowance.[87]

This proposal was accepted by the Board and, on February 19, 1923, the sum of $1088 was returned to the Board as an adjustment of the purchase price for Sumas IR 7 (the difference between 153.5 acres and 139.9 acres at $80 an acre equals $1088).[88] Nothing in the evidence presented to the Commission indicates that the Band was ever consulted or was even aware that these negotiations to refund a portion of the purchase price of IR 7 were occurring with the Soldier Settlement Board.

SALE OF IR 7 BY SOLDIER SETTLEMENT BOARD

By August 1920 it was becoming apparent to the Soldier Settlement Board that the land on Sumas IR 7 might not be suitable for soldier settlement. The land needed extensive clearing before it could be cultivated, something that many soldiers, unaccustomed to agriculture, might not be prepared for. The Board began to consider the possibility of selling the land to civilians to dispose of it. On August 13, 1920, Commissioner Ashton of the Board wrote to the Chairman:

> . . . I am not at all sure that it is suitable for soldier settlement.
>
> In any event, if sold to soldiers, the men must be picked men, used to this class of clearing, or they would never make good. Furthermore, as some of this land will undoubtedly cost $150.00 an acre to clear, they cannot be expected to pay about $90.00 an acre for it. The best way out of this deal will probably be to hold the land for sometime and later sell it to civilians. . . .[89]

---

[87] J.D. McLean, Acting Deputy Superintendent General of Indian Affairs, to S. Maber, Secretary, SSB, Ottawa, January 29, 1923, NA, RG 10, vol. 7535, file 26,153-1 (ICC Documents, p. 333).

[88] S. Maber, Secretary, SSB, Ottawa, to J.D. Mclean, Acting Deputy Superintendent General of Indian Affairs, February 1, 1923; McLean to Maber, February 19, 1923; SSB, official receipt, February 20, 1923; Maber to Secretary, Department of Indian Affairs, NA, RG 10, vol. 7535, file 26,153-1 (ICC Documents, pp. 334, 339, 340, 341).

[89] Major E.J. Ashton, Commissioner, SSB, Ottawa, to W.J. Black, Chairman, SSB, Ottawa, August 13, 1920 (ICC Documents, p. 311).

In December 1920, Commissioner Ashton wrote to Member of Parliament Stacey complaining that IR 7 was too expensive and was unsuitable for soldier settlement, and asking if civilians would pay the price needed to recoup the Board's expenses:

> . . . this matter has been carefully considered by the Board and a decision has been arrived at that we should endeavour to sell this whole reserve en bloc. . . .
>
> The Board has, on more than one occasion, taken our British Columbia Superintendents severely to task for purchasing land at excessive figures, and informed them very definitely that they are not to purchase land for soldier settlement at anything higher than the inspector's valuation.
>
> On May 5, Messrs. — Schetky and E. Copeland appraised the reserve and put a valuation of $50.00 per acre on it. Some time ago regulations were passed forbidding the purchase of totally uncleared land for soldier settlement. We cannot take action diametrically opposed to regulations we have been insisting that our Superintendents carry out.
>
> In your letter to me of July 4th, 1919, you stated that there were eight returned soldiers applying for the purchase of this property, and a few days before this, when we met in your office in the Parliament Buildings, you intimated that the adjoining farmers were anxious to secure this reserve for their sons. As in view of our Regulations we are unable to sell this land in the ordinary way to soldier settlers, could you inform us as to the possibility of selling to civilians at the figure we gave for it? . . .[90]

In the following month, however, the Inspector of the Board's Western Offices reviewed the file and, being firmly convinced that no action should be taken to sell the reserve to returned soldiers under the Act and also that it would be "injudicious" on the part of the Board to sell this land to civilians except as a whole, he recommended that no immediate action be taken to dispose of the land whatsoever.[91] Commissioner Ashton accepted this recommendation, with the proviso that any offer to purchase all or part of the land must still be carefully considered.[92]

---

[90] Major E.J. Ashton, Commissioner, SSB, Ottawa, to F.B. Stacey, Member of Parliament, Penticton, BC, December 15, 1920 (ICC Documents, p. 313).

[91] L. Boyd, Inspector, Western Offices, SSB, Ottawa, to Major E.J. Ashton, Commissioner, SSB, Ottawa, January 29, 1921 (ICC Documents, p. 314).

[92] Major E.J. Ashton, Commissioner, SSB, Ottawa, to L. Boyd, Inspector, Western Offices, SSB, Ottawa, January 31, 1921 (ICC Documents, p. 315).

Two months after this decision was taken, the Annual Report of the Soldier Settlement Board was released. Under a section entitled "Meaning of Suitable Lands," it stated:

> If the first maxim is that the men must be "fit to farm" the second maxim is that the land must be "fit to farm." They are of equal importance. From the commencement of operations the Board laid it down that land was not suitable for soldier settlement which was remote from transportation or which was not ready for cultivation or which was of a price greater than its productive value.[93]

Almost two years later, in January 1923, the Soldier Settlement Board advised the Department of Indian Affairs that it was having difficulty selling the surrendered land in former IR 7:

> . . . While the lands have been available for sale for the past two years and have been extensively advertised, the Board have only been able to dispose of a small portion. The sale has not been restricted to soldier settlers but has been open to civilians and the price asked has been that which the Board paid your Department.[94]

Aside from the issue of price, buyer reluctance could have been attributed in part to unpaid dyking charges on the land and difficulties encountered by the Board in having its title registered by the province. At this time the *British Columbia Land Registry Act* required the consent of the Lieutenant Governor in Council before title to Indian Reserve land could be registered. When the Soldier Settlement Board applied to have the title registered in September 1922, the province refused to issue the necessary order in council. One of the reasons given related to an ongoing dispute between the province and the Board about the collection of municipal and improvement taxes on Board lands. Since these particular lands were within the Sumas Dyking Area, the province was reluctant to register the title because the dyking charges could not be recovered from the Board. The province also questioned the validity of the grant from the Department of Indian Affairs, claiming that the reversionary fee was in the Crown in right of the Province, and therefore the Board needed a provincial crown grant.

---

[93] "Soldier Settlement on the Land," Annual Report of the Soldier Settlement Board, March 31, 1921, p. 10 (ICC Documents, p. 321).

[94] S. Maber, Secretary, SSB, Ottawa, to D.C. Scott, Deputy Superintendent General of Indian Affairs, January 23, 1923, NA, RG 10, vol. 7535, file 26,153-1 (ICC Documents, p. 331).

This dispute with the province continued through 1923. At least two potential sales of lots on Sumas IR 7 were lost when the applicants refused to complete the sales because the Board could not deliver title. In February 1924, the Chairman of the Soldier Settlement Board outlined these problems to the Deputy Superintendent General of Indian Affairs and suggested that the lands could be returned to the Department:

> As no agreements have been executed by the Board covering the sale of any of the land in the reserve and as we are not committed to any settlers, the Board could return the patent to your department if you are unable to suggest any other procedure which would overcome the present impasse.[95]

Deputy Superintendent General Scott's reply to this proposal was to suggest that the Board "allow the matter to stand for a short while as I hope to be able to report a settlement of the general reserve question in British Columbia which will enable your patent to be registered."[96] Several months later, the Vancouver District Superintendent of the Soldier Settlement Board wrote to the Superintendent of the Loan Review and Records Branch of the Board in Ottawa that "it would be the best solution of our difficulties if the Department of Indian Affairs could be persuaded to take back this reserve as it will be a difficult piece of property to dispose of as a whole on account of it being uncleared and so badly cut up."[97] There is, however, nothing in the material reviewed to indicate that the Department was approached again with this proposal. On July 22, 1924, Deputy Superintendent General Scott informed Commissioner Ashton that the order in council confirming the McKenna-McBride Commission Report had passed "and there is no reason now why the patent should not be registered."[98]

---

[95] John Barnett, Chairman, SSB, to Deputy Superintendent General of Indian Affairs, February 29, 1924, NA, RG 10, vol. 7535, file 26153-1 (ICC Documents, p. 367).

[96] D.C. Scott, Deputy Superintendent General of Indian Affairs, to John Barnett, Chairman, SSB, March 4, 1924 (ICC Documents, p. 368).

[97] I.T. Barnet, District Superintendent, SSB, Vancouver, to Superintendent, Loan Review and Records Branch, SSB, Ottawa, July 7, 1924 (ICC Documents, p. 369).

[98] D.C. Scott, Deputy Superintedent General of Indian Affairs, to Major E.J. Ashton, Commissioner, SSB, Ottawa, July 22, 1924 (ICC Documents, p. 371).

Even after this initial hurdle was overcome, the Soldier Settlement Board had a difficult time attracting buyers for the lots on the surrendered Sumas IR 7. This difficulty was attributed in part to both the cost of clearing and the extra expenses of the dyking project. By 1930, however, all the lots were sold. Table 1 shows the purchase price paid for each lot: the average sale price for the 145.08 acres sold amounted to $81.81 per acre. Only the purchaser of lot 9 is identified as a returned soldier. The purchaser of lot 2 and lots 5 to 8 are stated to be civilians, and the other purchasers are not designated.[99] The general location of these lots within the subdivision of IR 7 is shown on Map 2 on page 30.[100]

TABLE 1

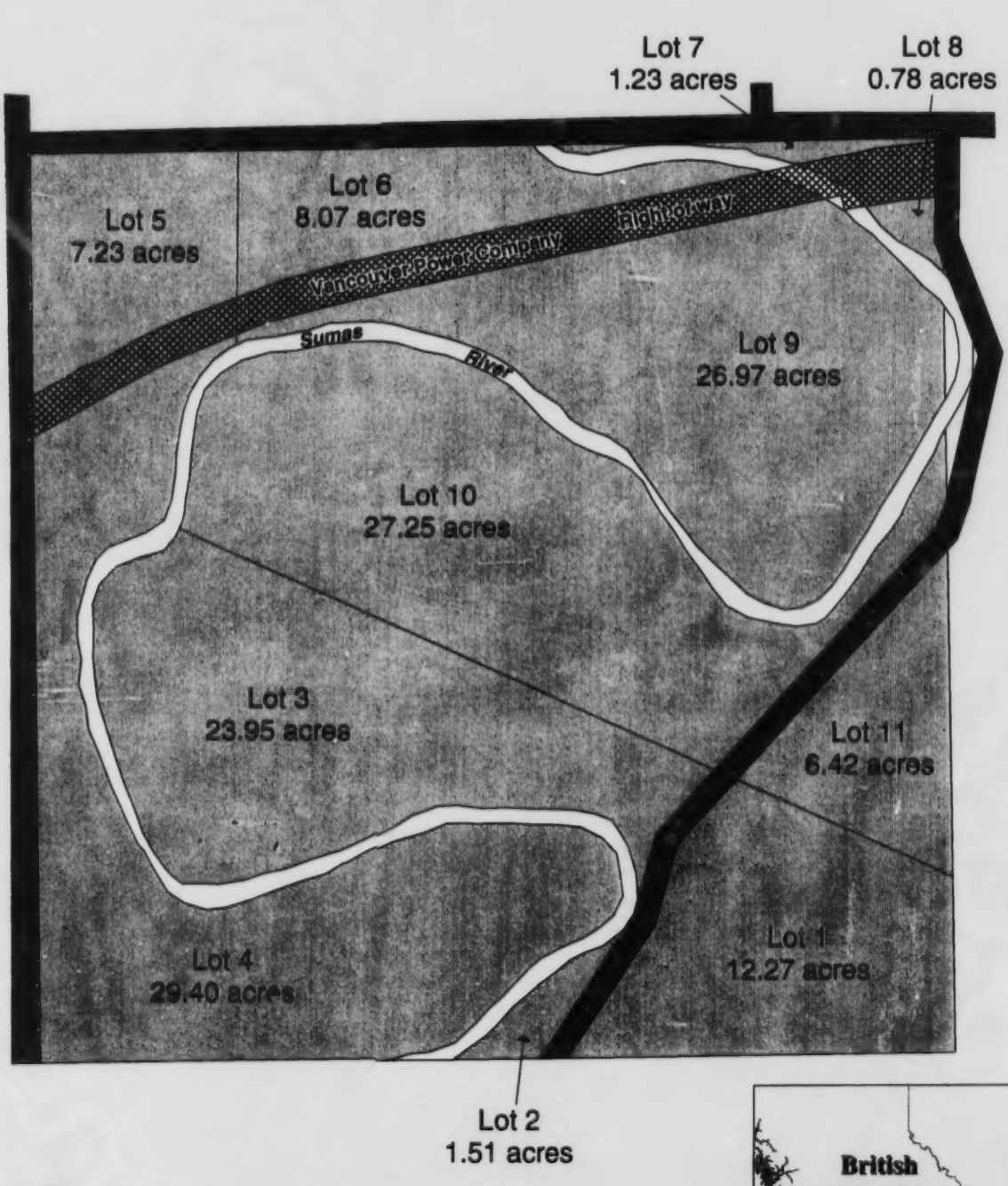
Purchase Price of Lots in Sumas IR 7

Lot Number	Acreage	Date	Price/Acre	Income
5, 6, 7, & 8	17.31	February 1927	$125/acre	$2,163.75
2	1.51	March 1928	$139.07/acre	$210.00
9	26.97	April 1929	$74.16/acre	$2,000.00
1 & 11	18.69	June 1930	$80/acre	$1,495.20
3, 4, & 10	80.6	July 1930	$74.44/acre	$6,000.00
TOTAL	**145.08**		**$81.81/acre**	**$11,868.95**

[99] The information here and in the table is taken from various documents submitted to the Commission. All acreages are from ICC Documents, pp. 299-300; dates, prices, and income from pp. 379-83, 392, 395-96.

[100] This map has been adapted from Survey Plans - Subdivision of Sumas IR 7, A.E. Humphrey, Surveyor, May 5, 1920 (ICC Documents, pp. 299-301).

Map 2: Sumas Indian Reserve No. 7



PART III

ISSUES

The purpose of this inquiry is to determine whether the Sumas Indian Band has a valid claim for negotiation under the Government of Canada's 1982 Specific Claims Policy, as outlined in *Outstanding Business*. To reiterate, that Policy states that the government will recognize claims that disclose an outstanding "lawful obligation" on the part of the federal government.

The question whether the surrender of Sumas IR 7 by the Sumas Band was lawful gives rise to a number of different legal issues. The parties agreed to the following joint formulation of issues in this inquiry:

1 **Did the Crown have any fiduciary or trust obligations to the Band prior to the surrender, and if so, were those fiduciary or trust obligations fulfilled?**

2 **Did the Crown, in obtaining the surrender from the Band, comply with the surrender requirements of the *Indian Act*?**

In particular:

a) **Did the Crown or its agents exercise undue influence/duress over the members of the Band in order to obtain the surrender? and**

b) **Is the Crown's receipt of an advance on the purchase price of reserve land prior to the completion of the surrender contrary to the provisions of the *Indian Act*?**

3 **Is the Crown's receipt of an advance of the purchase price of reserve land prior to the completion of the surrender contrary to the Crown's fiduciary obligations, if any, with regard to the management of reserve or surrendered land?**

4 **If the surrender is valid:**

a) **Did the Crown fulfil their fiduciary obligations to the Band subsequent to the surrender? and/or**

b) **Did the subsequent disposition of the lands comprising IR 7 violate the terms of the surrender or the applicable legislation (*Indian Act*; *Soldier Settlement Act*) or constitute a breach of the Crown's fiduciary obligation to the Band?**

5 **If the evidence is inconclusive on any previous issues, which party has the onus of proof?**

To assist in our deliberations, the parties have provided us with a wealth of information for our review and consideration. All this information has been carefully considered, and the issues identified by the parties will be addressed in Part IV of this report.

PART IV

ANALYSIS

SURRENDER PROVISIONS OF THE 1906 *INDIAN ACT*

Before considering whether the Crown owed any fiduciary obligations to the Sumas Band in the circumstances of this claim, we will begin with a brief review of the procedural requirements for a surrender under the *Indian Act*.[101] The relevant provisions of the 1906 *Indian Act* prohibit the direct sale of reserve lands to non-Indians by requiring that the band consent to the surrender of reserve land to the federal Crown.

The formal requirements for a valid surrender and alienation of Indians lands are set out in sections 48 through 50 of the 1906 *Indian Act*:

> 48. Except as in this Part otherwise provided, no reserve or portion of a reserve shall be sold, alienated or leased until it has been released or surrendered to the Crown for the purposes of this Part; Provided that the Superintendent General may lease, for the benefit of any Indian, upon his application for that purpose, the land to which he is entitled without such land being released or surrendered, and may, without surrender, dispose to the best advantage, in the interests of the Indians, of wild grass and dead or fallen timber.
>
> 49. Except as in this Part otherwise provided, no release or surrender of a reserve, or a portion of a reserve, held for the use of the Indians of any band, or any individual Indian, shall be valid or binding, unless the release or surrender shall be assented to by a majority of the male members of the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of an officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General.
>
> 2. No Indian shall be entitled to vote or be present at such council, unless he habitually resides on or near, and is interested in the reserve in question.
>
> 3. The fact that such release or surrender has been assented to by the band at such council or meeting shall be certified on oath by the Superintendent General, or by the officer authorized by him to attend such council or meeting, and by some of the chiefs or principal men present thereat and entitled to vote, before some judge of a superior, county or district court, stipendiary magistrate or justice of the peace, or, in the case of reserves in the province of Manitoba, Saskatchewan or Alberta, or the

---

101 RSC 1906, c. 81, as amended.

> Territories, before the Indian commissioner, and in the case of reserves in British Columbia, or, in either case, before some other person or officer specially thereunto authorized by the Governor in Council.
>
> 4. When such assent has been so certified, as aforesaid, such release or surrender shall be submitted to the Governor in Council for acceptance or refusal.
>
> 50. Nothing in this Part shall confirm any release or surrender which, but for this Part, would have been invalid; and no release or surrender of any reserve, or portion of a reserve, to any person other than His Majesty, shall be valid.[102]

In *Cardinal v. R.*,[103] Estey J interpreted the surrender provisions of the *Indian Act* and concluded that the following procedural requirements must be complied with for there to be a valid surrender:

> It has also been argued that the interpretation which is now being considered is one which exposes the membership of the band to a risk of loss of property and other rights, contrary to the general pattern and spirit of the *Indian Act*. It is perhaps well to observe in this connection that there are precautions built into the procedures of Pt. I of the Act, dealing with surrender. Firstly, the meeting must be called to consider the question of surrender explicitly. It may not be attended to at a regular meeting or one in respect of which express notice has not been given to the band. Secondly, the meeting must be called in accordance with the rules of the band. Thirdly, the chief or principal men must certify on oath the vote, and that the meeting was properly constituted. Fourthly, only residents of the reserve can vote, by reason of the exclusionary provisions of subs. (2) of s. 49. Fifthly, the meeting must be held

---

102 These protective provisions of the 1906 *Indian Act* trace their origin to the *Royal Proclamation, 1763*, which entrenched and formalized the process whereby only the Crown could obtain Indian lands through agreement or purchase from the Indians. The Proclamation states:

> And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians; In order, therefore, to prevent such irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie. . . .

103 *Cardinal v. R.*, [1982] 1 SCR 508, [1982] 3 CNLR 3, 13 DLR (4th) 321.

> in the presence of an officer of the Crown. And sixthly, even if the vote is in the affirmative, the surrender may be accepted or refused by the Governor in Council. *It is against this background of precautionary measures that one must examine the manner in which the assent of eligible members of the band is to be ascertained under s. 49.*[104]

Therefore, the procedural requirements for a surrender under section 49 of the 1906 *Indian Act* can be summarized as follows:

1. a meeting must be summoned for the express purpose of considering whether to surrender the land – that is, a proposal for surrender cannot be raised at a regular meeting of the band or at a meeting where no express notice of the proposed surrender has been provided;

2. the meeting must be called in accordance with the rules of the band;

3. the meeting must be held in the presence of the Superintendent General or an authorized officer;

4. a majority of the male members of the band of the full age of twenty-one years must attend the meeting, and a majority of those attending must in turn assent to the surrender;

5. under subsection (2), only those men ordinarily resident on the reserve are eligible to vote;

6. under subsection (3), the band's assent to the surrender must be certified on oath by the Crown and the band; and

7. under subsection (4), the surrender must be submitted to the Governor in Council for acceptance or refusal.

As we stated in the Kahkewistahaw inquiry,[105] the first six of these criteria deal with a *band's consent* to the surrender of all or a portion of its reserve. Once the band has consented to the

---

104 *Cardinal v. R.*, [1982] 1 SCR 508, [1982] 3 CNLR 3, 13 DLR (4th) 321 at 10.

105 ICC, *Kahkewistahaw First Nation Report on the 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), 80-81.

surrender, the *consent of the Governor in Council* is also required before it can be said that the surrender was obtained in compliance with the *Indian Act*.

Aside from the question whether the Governor in Council ought to have withheld consent to the surrender of Sumas IR 7 pursuant to section 49(4) of the 1906 *Indian Act* (which shall be discussed later in this report), legal counsel for the Sumas Band did not formally challenge the validity of the surrender. Technical compliance with the procedural requirements of the *Indian Act* is not disputed. The surrender document in this case, witnessed by Indian Agent Byrne, was executed on behalf of the Band by Chief Ned and seven other Band members. Nine individuals were listed on the voters' list as having been present at the surrender meeting, and all nine voted in favour of the surrender. The surrender declaration was sworn by Agent Byrne, Chief Ned, Oscar Ned, and Gus Commodore, attesting to the fulfilment of the formal procedural requirements of the *Indian Act*.

Although the technical validity of the surrender is not in issue, legal counsel for the Sumas Band submitted that any expression of consent by the Band in 1919 was vitiated as a result of the Crown's actions and breach of fiduciary obligations in obtaining the surrender, thereby rendering the surrender wholly void. Thus, before embarking on an in-depth consideration of the existence and extent of the Crown's fiduciary duties, we will examine whether actions of the Crown are capable of rendering an otherwise valid surrender void or voidable.

Effect of Technical Compliance with the *Indian Act*

What then, is the effect of a surrender which is valid in a purely technical sense but which raises questions of Crown conduct during the surrender process? For guidance, it is necessary to consider the recent decision in *Chippewas of Kettle and Stony Point v. Canada*,[106] a case which involved an assertion by the claimant First Nation that the surrender was invalid because the purchaser was present at the surrender meeting and paid Band members to influence them to vote in favour of the surrender contrary to the *Royal Proclamation of 1763* and the *Indian Act*. On a motion for summary judgment, Killeen J held that certain provisions of the *Indian Act* are mandatory while others are simply directory. Nevertheless, "it is simply impossible to argue that s. 49(1) does not lay down a

---

[106] *Chippewas of Kettle and Stony Point v. Canada* (1995), [1996] 1 CNLR 54, 24 OR (3d) 654 (Gen. Div.); affirmed by the Ontario Court of Appeal in *Chippewas of Kettle and Stony Point v. Canada* (1997), 31 OR (3d) 97 (Ont. CA).

mandatory precondition for the validity of any surrender. If the surrender in question has not followed s. 49(1), it must be void *ab initio* [ie. void from the outset]. To suggest otherwise is to re-write history and the commands of the *Royal Proclamation* and the *Indian Act*."[107]

With respect to the Chippewa First Nation's arguments that the surrender was invalid because it was obtained through duress or because it amounted to an unconscionable transaction, Killeen J stated that equitable and contract doctrines cannot be read into the *Indian Act* and, thus, "cannot affect the validity of the Order in Council [approving the surrender]; *rather, such finding or findings must surely go to the Band's other claim for breach of fiduciary duty.*"[108] At the Ontario Court of Appeal in *Chippewas of Kettle and Stony Point*, Laskin JA had the benefit of considering the recent Supreme Court of Canada decision in *Apsassin*, but nevertheless reached a similar conclusion with regard to alleged improprieties of the Crown in the pre-surrender context:

> . . . what then of the cash payments, which, in the words of the motions judge, had "an odour of moral failure about them"? In my view, there is no evidence to suggest that these cash payments, in the words of McLachlin J., vitiated the "true consent" or the "free and informed consent" of the Band or, in the words of Gonthier J., "made it unsafe to rely on the Band's understanding and intention." In keeping with *Apsassin*, the decision of the Band to sell should be honoured. Therefore, like Killeen J., I am satisfied that there is no genuine issue for trial on whether the cash payments invalidated the surrender. I would dismiss the Band's second ground of appeal.
>
> I add, however, that the cash payments or alleged "bribe" and consequent exploitation or "tainted dealings" may afford grounds for the Band to make out a case of breach of fiduciary duty against the Crown. As the parties have recognized, this is an issue for trial. The same may be said of the Band's contention that the sale to Crawford was improvident, he having immediately "flipped" the land for nearly three times the purchase price. . . .[109]

Therefore, recent case law suggests that where there has been technical compliance with the procedural requirements of the *Indian Act*, no challenge can be made to the validity of the surrender

---

[107] *Chippewas of Kettle and Stony Point v. Canada* (1995), [1996] 1 CNLR 54, 24 OR (3d) 654 at 685 (Gen. Div.).

[108] *Chippewas of Kettle and Stony Point v. Canada* (1995), [1996] 1 CNLR 54, 24 OR (3d) 654 at 698 (Gen. Div.). Emphasis added.

[109] *Chippewas of Kettle and Stony Point v. Canada* (1997), 31 OR (3d) 97 at 106 (CA).

itself on the grounds that the Crown breached its fiduciary obligations in the process leading up to the surrender. Nevertheless, a valid claim for compensation could be based on the Crown's breach of fiduciary duty, providing there is evidence to establish that such a duty was owed to the Sumas Band in the circumstances of this claim. We now turn our analysis to the facts of this case to determine whether the Crown owed any fiduciary obligations to the Sumas Band and, if so, whether the Crown was in breach of these obligations.

ISSUE 1 FIDUCIARY OBLIGATIONS OF THE CROWN

Did the Crown have any fiduciary or trust obligations to the Band prior to the surrender, and if so, were those fiduciary or trust obligations fulfilled?

In arguing that the Crown owed a fiduciary duty to the Sumas Band in relation to the surrender of IR 7, counsel for the Band refers to a number of cases in which the courts recognize that the relationship between the Crown and aboriginal peoples is *per se* fiduciary in nature.[110] Even if it were necessary to find a fiduciary relationship anew each time, the Band submits that the relationship between the Crown and the Sumas Band in the context of this surrender transaction has all the hallmarks that give rise to fiduciary duties on the part of the Crown.[111] The Band argues that as a result of its vulnerability, its relative lack of sophistication, and the power imbalance between the Sumas people and the Crown in 1919, the relevant fiduciary obligations owed to the Band in the context of the surrender are to consider the best interests of the Band; to provide full disclosure of all relevant information concerning the transaction; to disclose to the Band the Crown's own interest

---

110 *Guerin v. The Queen*, [1984] 2 SCR 335; *R. v. Sparrow* (1990), 70 DLR (4th) 385, [1990] 3 CNLR 160 (SCC); *Blueberry River Band v. Canada (Department of Indian Affairs and Northern Development)* (subnom. *Apsassin v. Canada*) (1995), [1996] 2 CNLR 25, 130 DLR (4th) 193 (SCC); *R. v. Badger*, [1996] 2 CNLR 77 (SCC); *Wewayakum Indian Band v. Canada*, [1989] 1 SCR 322; *Delgamuukw v. British Columbia*, [1993] 5 WWR 97 (BCCA).

111 *Frame v. Smith* (1987), 42 DLR (4th) 81 (SCC); *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 SCR 574; *Quebec (Attorney General) v. Canada (National Energy Board)* (1994), 112 DLR (4th) 129 (SCC); *Blueberry River Band v. Canada (Department of Indian Affairs and Northern Development)* (subnom. *Apsassin v. Canada*) (1995), [1996] 2 CNLR 25, 130 DLR (4th) 193 (SCC); *M.(K.) v. M.(H.)*, [1992] 3 SCR 6; *Norberg v. Wynrib*, [1992] 2 SCR 226; *Hodgkinson v. Simms*, [1994] 9 WWR 609 (SCC); Frankel, "Fidicuary Law" (1983), 71 Calif. L. Rev. 795.

in the transaction; and to explain fully all consequences of the transaction. The Band argues that these obligations were not fulfilled and that there is no evidence that the Crown:

- ever turned its mind to whether this transaction was in the interests of the Band;
- revealed to the Band how the proposed details of the transaction had been arrived at and in particular that the Indian Agent believed that the land was worth $100.00 per acre rather than the $80.00 per acre which was agreed to between DIA [Department of Indian Affairs] and the SSB [Soldier Settlement Board]; and
- disclosed the nature of the Crown's relationship to the SSB and its interest in promoting the surrender and disposal of the Band's reserve.[112]

The Band contends that the non-fulfilment of these obligations resulted in a breach of the Crown's fiduciary duty to the Sumas Band. Finally, the Band further submits that the Crown breached its fiduciary duty by allowing a surrender that left the Band with insufficient reserve land to meet its needs.

In reply, Canada submitted that the relationship between Canada and the Band did not give rise to any trust responsibilities on the part of Canada prior to the surrender, since Mr Justice Dickson (as he then was) stated in *Guerin* that "before surrender, the Crown does not hold land in trust for the Indians."[113] Moreover, Canada argues that, before the surrender, Canada did not stand in a fiduciary relationship with the Band which would give rise to a fiduciary obligation to determine whether the surrender was in the best interests of the Band. To the extent that Canada did have any pre-surrender fiduciary obligation – such as the duty to prevent an exploitative bargain – there was no breach on the part of Canada of any such duty.[114]

Following the Supreme Court of Canada's landmark decision in *Guerin*, the Canadian courts have struggled to identify a single fiduciary principle in order to define the limits of the doctrine and

---

112 Submissions of the Sumas Indian Band, April 16, 1996, pp. 15-16

113 *Guerin v. The Queen*, [1984] 2 SCR 335, [1986] 6 WWR 481, 13 DLR (4th) 321, [1985] CNLR 120 at 138.

114 Government of Canada's Written Submissions, April 23, 1996, pp. 13-14.

its application in various fact situations. Outside the established categories where a fiduciary relationship *prima facie* exists (e.g., trustee-beneficiary, doctor-patient, solicitor-client), the courts have sought to identify the requisite elements for imposing a fiduciary obligation on a new relationship. Thus, in *Frame v. Smith*, Wilson J offered the following principles to guide the courts in determining whether a fiduciary obligation should be imposed under the circumstances:

> . . . There are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.
>
> Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The beneficiary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[115]

It is also important to observe that any doubt whether aboriginal people stand in a fiduciary relationship with the Crown has been laid to rest by the Supreme Court of Canada. The *Guerin* decision provided the first instance where the courts recognized the relationship between aboriginal people and the Crown as fiduciary in nature. This decision was reaffirmed in *R. v. Sparrow*,[116] and most recently by Mr Justice Iacobucci in *Quebec (Attorney-General) v. Canada (National Energy Board)*:

> It is now well-settled that there is a fiduciary relationship between the federal Crown and the aboriginal people of Canada: *Guerin v. Canada* . . . None the less, it must be remembered that not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation: *Lac Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 14, 26 C.P.R. (3d) 97,

---

115 *Frame v. Smith*, [1987] 2 SCR 99, 42 DLR (4th) 81 at 99.

116 *R. v. Sparrow* (1990), 70 DLR (4th) 385, [1990] 3 CNLR 160 (SCC).

> [1989] 2 S.C.R. 574. The nature of the relationship between the parties defines the scope, and the limits, of the duties that will be imposed.[117]

Stated in such clear and plain language, it is apparent that the Supreme Court of Canada recognizes that the relationship between the Crown and aboriginal peoples is inherently fiduciary in nature. However, Mr Justice Iacobucci was also clear that not every aspect of the relationship will give rise to a specific fiduciary obligation. Rather, the scope and content of the fiduciary's duties can only be determined through a careful analysis of the nature of the relationship between the parties.

The task before us, then, is to define the scope and content of the Crown's fiduciary duties to the Sumas Band, if any, in view of the particular facts and circumstances of this claim. Before commencing our analysis of the facts and the nature of the relationship that existed between Canada and the Sumas Band in 1919, we shall begin with a review of the *Guerin* and *Apsassin* decisions of the Supreme Court of Canada, since both cases are of particular importance in the present claim.

The *Guerin* Case

The facts in *Guerin* involve the surrender of 162 acres of reserve land by the Musqueam Indian Band to the federal Crown for lease to a golf club on certain terms as agreed to by the band council. The surrender document gave the land to the Crown in trust to lease "upon such terms as it deemed most conducive to the welfare of the band." The terms of the lease obtained by the Crown were in fact much less favourable than those originally agreed to by the band council. The band was unable to obtain a copy of the lease until some 12 years later, and subsequently commenced an action for damages against the Crown in 1975. The Supreme Court of Canada held that section 18(1) of the *Indian Act*, which confers discretion on the Crown to decide where the band's best interests lie, transforms the Crown's obligation to deal with the land after surrender on behalf of the band into a fiduciary duty that will be supervised by the courts. Mr Justice Dickson held that while the Crown's obligations to Indians cannot be defined as a trust, the absence of a formal trust relationship

---

117 *Quebec (A.-G.) v. Canada (National Energy Board)* (1994), 112 DLR (4th) 129 at p 147 (SCC).

does not mean that the Crown owes no enforceable duty to the band in the way in which it deals with Indian land:

> In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.
>
> The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.
>
> An Indian band is prohibited from directly transferring its interest to a third party. Any sale or lease of land can only be carried out after a surrender has taken place, with the Crown then acting on the band's behalf. The Crown first took this responsibility upon itself in the *Royal Proclamation of 1763* [see R.S.C. 1970, App. I]. It is still recognized in the surrender provisions of the *Indian Act.* The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians.[118]

Furthermore, in discussing the discretion of the Crown to sell or lease on terms that were "deemed most conducive to the general welfare of the Band," Mr Justice Dickson stated:

> This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown's obligation into a fiduciary one. Professor Ernest J. Weinrib maintains in his article "The Fiduciary Obligation" (1975), 25 U.T. L.J. 1, at p. 7, that "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion." Earlier, at p. 4, he puts the point in the following way:
>
> > [Where there is a fiduciary obligation] there is a relation in which the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has

---

118 *Guerin v. The Queen*, [1984] 2 SCR 376.

> been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion.
>
> I make no comment upon whether this description is broad enough to embrace all fiduciary obligations. *I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.*
>
> It is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director and the like. I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed.[119]

Applying the facts in *Guerin* to these guiding principles, Mr Justice Dickson found that the Crown had breached its fiduciary obligation towards the band by accepting less favourable terms than those contained in the surrender without the band's approval:

> After the Crown's agents had induced the band to surrender its land on the understanding that the land would be leased on certain terms, it would be unconscionable to permit the Crown simply to ignore those terms . . . The existence of such unconscionability is the key to a conclusion that the Crown breached its fiduciary duty. Equity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal.[120]

Although *Guerin* confirmed the existence of a post-surrender fiduciary obligation, the Court did not expressly state that the Crown may have other types of fiduciary duties outside this specific context. However, Mr Justice Dickson emphasized that it is the *nature of the relationship*, rather than membership in an already established category, that gives rise to fiduciary relations. He further noted that the categories of fiduciaries "should not be considered closed," thereby recognizing the evolving nature of the fiduciary principle.

Of particular relevance to this claim is the decision of the Supreme Court of Canada in the *Apsassin* case, which dealt with the issue whether fiduciary obligations on the part of the Crown can arise in a pre-surrender context.

---

119 *Guerin v. The Queen*, [1984] 2 SCR 384. Emphasis added.

120 *Guerin v. The Queen*, [1984] 2 SCR 388-89.

The *Apsassin* Case

At issue in *Apsassin* was the validity of two land surrenders in 1940 and 1945. In 1940 the Beaver Indian Band[121] surrendered the mineral rights in its reserve to the Crown, in trust, "to lease" for its benefit. In 1945 the Band agreed to surrender its entire interest in the reserve to the Crown for "sale or lease." The Department of Indian Affairs sold the entire reserve to the Director of the *Veterans' Land Act* (DVLA) in 1948 for $70,000; through "inadvertence," however, the Department also transferred the mineral rights. Following the sale, the lands were discovered to contain oil and gas deposits. Once these facts were discovered, the band commenced an action for damages resulting from the improper transfer of the mineral rights and sought a declaration that the 1945 land surrender was invalid on the ground that the Crown had committed several acts and omissions that constituted negligence and breach of fiduciary obligation owed to the band.

At trial,[122] Addy J dismissed all but one of the band's claims. He found that no fiduciary duty existed prior to or concerning the surrender, and that the Crown had not breached its post-surrender fiduciary obligation with respect to the mineral rights, since those rights were not known to be valuable at the time of disposition. He also found, however, that the Department had breached a post-surrender fiduciary duty by not seeking a higher price for the surface rights.

The Federal Court of Appeal[123] dismissed the band's appeal and the Crown's cross-appeal. However, the majority rejected the trial judge's conclusion that no fiduciary duty arose prior to the surrender. The Federal Court of Appeal held that the combination of the particular facts of the case and the *Indian Act* imposed a fiduciary obligation on the Crown. The specific nature of the obligation was not to prevent the surrender or to substitute the Crown's own decision for that of the band, but rather to ensure that the band was properly advised of the circumstances concerning the surrender and of the options open to it, since the Crown itself had sought the surrender of the lands to make them available to returning soldiers.

---

121 The Beaver Indian Band eventually split into two bands known as the Blueberry River Indian Band and the Doig River Band.

122 *Blueberry River Indian Band and Doig River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1988] 14 FTR 161, 1 CNLR 73 (Fed. TD).

123 *Apsassin v. Canada*, [1993] 3 FC 28, 100 DLR (4th) 504, 151 NR 241, [1993] 2 CNLR 20 (Fed. CA).

Although the majority concluded that the Crown owed a pre-surrender fiduciary duty to the band, Stone JA (Marceau JA concurring) agreed with Justice Addy's disposition of the case. Stone JA held that the Crown had discharged its duty, since the band had been fully informed of "the consequences of a surrender," was fully aware that it was forever giving up all rights to the reserve, and gave its "full and informed consent to the surrender."[124] Stone JA also found that the Crown did not breach a post-surrender fiduciary obligation with respect to the disposition of the mineral rights because they were considered to be of minimal value at the time of the surrender. Once the rights had been conveyed to the DVLA, any post-surrender fiduciary obligation of the Department of Indian Affairs was terminated, and the Crown had no further obligation to deal with the land for the benefit of the Band.

At the Supreme Court of Canada, the Court was divided 4-3 on the question whether the mineral interests were included in the 1945 surrender for sale or lease. The Court, however, was unanimous in concluding that the Crown had breached its post-surrender fiduciary obligation to dispose of the land in the best interests of the band because the Crown had "inadvertently" sold the mineral rights in the reserve lands to the DVLA and then failed to use its statutory power to cancel the sale once the error had been discovered. With respect to the Crown's pre-surrender fiduciary duties, Justice Gonthier, writing for the majority, agreed with Justice McLachlin's minority reasons and concluded that the Crown discharged its duties on the facts in that case.

In disposing of the case on the issue of pre-surrender duties and breaches, McLachlin J conducted her analyses from two perspectives: first, as an inquiry into whether the *Indian Act* imposed a fiduciary obligation on the Crown with respect to the surrender; and, second, as an inquiry into whether the facts and circumstances of the case gave rise to any fiduciary duties.

On the question whether the *Indian Act* imposed a fiduciary duty on the Crown to refuse the Band's surrender of its reserve, McLachlin J struck a middle ground between the polarized positions of the parties:

> *My view is that the Indian Act's provisions for surrender of band reserves strikes a balance between the two extremes of autonomy and protection.* The band's

---

[124] *Apsassin v. Canada*, [1993] 3 FC 28, 100 DLR (4th) 504, 151 NR 241, [1993] 2 CNLR 20 at 46 (Fed. CA).

> consent was required to surrender its reserve. Without that consent the reserve could not be sold. But the Crown, through the Governor in Council, was also required to consent to the surrender. *The purpose of the requirement of Crown consent was not to substitute the Crown's decision for that of the band, but to prevent exploitation.* As Dickson J. characterized it in *Guerin* [p. 136 CNLR]:
>
> > The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited.
>
> *It follows that under the Indian Act, the Band had the right to decide whether to surrender the reserve, and its decision was to be respected. At the same time, if the Band's decision was foolish or improvident – a decision that constituted exploitation – the Crown could refuse to consent. In short, the Crown's obligation was limited to preventing exploitative bargains. . . .*
>
> The measure of control which the Act permitted the Band to exercise over the surrender of the reserve negates the contention that *absent exploitation*, the Act imposed a fiduciary obligation on the Crown with respect to the surrender of the reserve.[125]

Therefore, McLachlin J concluded that the band's decision to surrender reserve land, as the expression of an autonomous actor, is to be respected unless that decision results in exploitation of the band. The Crown must respect the decision of the band, and the statutory regime does not impose a fiduciary duty on the Crown to withhold its consent to the surrender unless the band's decision is foolish, improvident, or amounts to an exploitative bargain.

The second branch of Justice McLachlin's analysis considered whether the particular facts of the case resulted in a fiduciary relationship being "superimposed on the regime for alienation of Indian lands contemplated by the Indian Act" – a question that requires a careful analysis of the facts on a case-by-case basis. In considering this issue, McLachlin J provided a succinct summary of the Supreme Court of Canada's decisions on the law of fiduciaries:

> Generally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second "peculiarly vulnerable" person: see *Frame v. Smith*, [1987] 2 SCR 99 [[1988] 1 CNLR 152 (abridged version)]; *Norberg v. Wynrib*, [1992] 2 SCR 226; and *Hodgkinson v. Simms*, [1994]

---

[125] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 at 39-40 (SCC), McLachlin J. Emphasis added.

> 3 SCR 377. The vulnerable party is in the power of the party possessing the power or discretion, who is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party. A person cedes (or more often finds himself in the situation where someone else has ceded for him) his power over a matter to another person. The person who has ceded power trusts the person to whom power is ceded to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation.[126]

On the facts in *Apsassin*, McLachlin J found that "the Band trusted the Crown to provide it with information as to its options and their foreseeable consequences, in relation to the surrender," but there was no evidence to suggest that "the Band abnegated or entrusted its power of decision over the surrender of the reserve to the Crown." In support of this conclusion, McLachlin J relied on the following findings of Addy J at the trial level:

1. That the plaintiffs had known for some considerable time that an absolute surrender of I.R. 172 was being contemplated;
2. That they had discussed the matter previously on at least three formal meetings where representatives of the Department were present;
3. That, contrary to what has been claimed by the plaintiffs, it would be nothing short of ludicrous to conclude that the Indians would not also have discussed it between themselves on many occasions in an informal manner, in their various family and hunting groups;
4. That, at the surrender meeting itself, that matter was fully discussed both between the Indians and with the departmental representatives previous to the signing of the actual surrender;
5. That neither Mr. Grew, Mr. Gallibois nor Mr. Peterson [Crown representatives] appeared to have attempted to influence the plaintiffs either previously or during the surrender meeting but that, on the contrary, the matter appears to have been dealt with most conscientiously by the departmental representatives concerned;
6. That Mr. Grew [the local Indian Agent] fully explained to the Indians the consequences of a surrender;
7. That, although they would not have understood and probably would have been incapable of understanding the precise nature of the legal interest they were surrendering, they did in fact understand that by the surrender they were giving up forever all rights to I.R. 172, in return for the money which would be deposited to their credit once the reserve was sold and with their being

---

126 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 at 40-41 (SCC).

furnished with alternate sites near their trapping lines to be purchased from the proceeds;

8. That the said alternative sites had already been chosen by them, after mature consideration.[127]

To summarize the foregoing discussion, the recent cases suggest that where there has been substantial compliance with the *Indian Act* and the band has voted in favour of a surrender, the Indian interest in the land is extinguished by operation of the statute. That, however, does not end the matter because it is also necessary to consider whether the Crown breached its fiduciary duties to the band as a result of the manner in which the surrender was obtained. It is, therefore, necessary to look behind the surrender decision to determine whether the Crown owed a fiduciary duty to the band in the surrender transaction. Where the facts warrant such a conclusion, a breach of the Crown's fiduciary duties could provide a separate basis for a valid claim by the band for compensation.

In the Commission's *Kahkewistahaw First Nation Report on the 1907 Reserve Land Surrender Inquiry*, we set forth our analysis and views in regard to the *Apsassin* decision. On the question whether the Crown owed any fiduciary duties to the Sumas Band which it failed to discharge, our analysis will be based in large measure on what we have already said in the *Kahkewistahaw Report*. In *Kahkewistahaw*, we reviewed the tests established by the courts for identifying whether a fiduciary obligation exists in the specific circumstances of the case, and we intend to adopt a similar approach for the purposes of this inquiry.

Pre-Surrender Fiduciary Duties of the Crown

Where a Band Has Ceded or Abnegated Its Power to Decide

In the interests of clarifying what Justice McLachlin meant by her statement in *Apsassin* that there must be a cession or abnegation of decision-making power before a fiduciary duty can arise on the specific facts of a case, it is useful to consider the comments she made in the minority judgment in *Norberg v. Wynrib*, which considered whether an abnegation of decision-making power had occurred in the context of a doctor-patient relationship:

---

127 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 at 41 (SCC).

> As we have seen, an imbalance of power is not enough to establish a fiduciary relationship. It is a necessary but not sufficient condition. There must also be the potential for interference with a legal interest or a non-legal interest of "vital and substantial 'practical' interest." And I would add this. Inherent in the notion of fiduciary duty, inherent in the judgments of this court in *Guerin* and *Canson* [*Enterprises Ltd.* v. *Boughton & Co.*, [1991] 3 SCR 534], *supra*, is the requirement that the fiduciary have assumed or undertaken to "look after" the interest of the beneficiary. As I put it in *Canson* at p. 543 [SCR], quoting from this court's decision in *Canadian Aero Service Ltd.* v. *O'Malley*, [[1974] SCR 592,] *supra*, at p. 606 [SCR], "the freedom of the fiduciary is diminished by the nature of the obligation he or she has undertaken – an obligation which betokens loyalty, good faith and avoidance of a conflict of duty and self-interest. . . ."
>
> The duties of trust are special, confined to the exceptional case where one person assumes the power which would normally reside with the other and undertakes to exercise that power solely for the other's benefit. It is as though the fiduciary has taken the power which rightfully belongs to the beneficiary on the condition that the fiduciary exercise the power entrusted exclusively for the good of the beneficiary.[128]

This issue has also been discussed at some length by the Supreme Court of Canada in *Hodgkinson*. In that case, the Court dealt with an action by an unsophisticated investor against his accountant, who had recommended certain tax shelters in which, unknown to the investor, the accountant had a personal interest. La Forest J stated:

> It is important . . . to add further precision about the nature of reliance, particularly as it applies in the advisory context. *Reliance in this context does not require a wholesale substitution of decision-making power from the investor to the advisor.* This is simply too restrictive. It completely ignores the peculiar potential for overriding influence in the professional advisor . . . *As I see it, the reality of the situation must be looked at to see if the decision is effectively that of the advisor, an exercise that involves a close examination of the facts.*[129]

Both *Norberg* and *Hodgkinson* suggest that there can be an effective transfer of decision-making authority even where, in a strictly technical sense, the principal has ostensibly made the decision on its own. It stands to reason, therefore, that the mere fact that a vote has been conducted

---

128 *Norberg* v. *Wynrib*, [1992] 4 WWR 577 at 622-23 (SCC), McLachlin J.

129 *Hodgkinson* v. *Simms*, [1994] 9 WWR 609 at 645 (SCC), La Forest J. Emphasis added.

in accordance with the surrender provisions of the *Indian Act* does not necessarily rule out the possibility that a band did, in fact, cede or abnegate its decision-making power to the Crown. To suggest otherwise would be to render McLachlin J's comments in *Apsassin* meaningless, since it would be difficult to imagine a situation in which there could be a cession or abnegation of decision-making control where a surrender has been approved by a band vote. Rather, it is relevant to look behind the ostensible consent of the band to determine whether any unfair advantage has been taken of the band as a result of its relative vulnerability and lack of sophistication *vis-à-vis* the Crown. Where there is evidence that the band has been taken unfair advantage of or has been manipulated into surrendering its land, equity must surely provide a remedy, given the Crown's role to protect aboriginal peoples from exploitative transactions involving their lands.

In written argument, Canada summarized its view of the issue as follows:

> . . . the relevant issue for consideration is whether the Band gave its full and informed consent to the surrender rather than whether Canada determined if the surrender was in the best interests of the Band. The notion advanced by the Band that the Crown has a fiduciary obligation to determine the best interests of a band prior to a surrender was in effect rejected by the Supreme Court of Canada in *Apsassin*.[130]

As a general principle, *Apsassin* stands for the proposition that bands are to be treated as autonomous actors whose decisions must be honoured and respected. The measure of control given to the band under the *Indian Act* to decide to surrender its reserve lands negates the contention that the Crown had a duty to act in the best interests of a band *unless* the band ceded or entrusted this power of decision to the Crown. Depending on the facts, it may very well be the case that the Crown does owe a specific fiduciary duty to act solely in the best interests of the band if there has been a cession or abnegation of decision-making power over a matter.

On the facts in this case, the Sumas Band submitted that the Crown unduly pressured it to surrender IR 7. In support of this argument, the Band focused on the conduct of Indian Agent Byrne, who, according to counsel for the Band, repeatedly approached the Band and pressured its members to grant the surrender. The historical record does reveal that Agent Byrne approached the Sumas Band on a number of occasions in an attempt to secure a surrender of IR 7. It would also appear that

---

130 Government of Canada's Written Submissions, April 23, 1996, p. 17.

his repeated attempts to obtain the surrender are indicative of the Sumas Band's initial reluctance to grant a surrender.

Acting under specific instructions to provide an opinion on the feasibility of obtaining a surrender of land, Agent Byrne reported on June 4, 1919, of a meeting he had with the Band:

> The Indians are divided in regard to this surrender, some are inclined to favourably consider it, while others strongly object, and it is doubtful if the consent of a majority can be obtained.[131]

Once in possession of the surrender forms to be submitted to the Sumas Band, Agent Byrne again reported on his meeting with the band and advised the Deputy Superintendent General of Indian Affairs, Duncan Campbell Scott, that "this is going to be a very slow job as these Indians are very hard to do business with."[132] Later, in his response to a request for an update on the progress regarding the surrender, Agent Byrne reported, ". . . I again interviewed the Chief and he told me that he would get his people together to try and have them consent to giving the surrender, as desired by you."[133] On October 31, 1919, Agent Byrne attended a meeting where the Band agreed to the surrender of Sumas IR 7.

We agree with counsel for the Band that Agent Byrne's persistence in seeking the surrender warrants close scrutiny in light of the conflicting interests of Indian Affairs and the Soldier Settlement Board in the reserve lands. However, after a careful examination of all the surrounding facts and circumstances, there is insufficient evidence to confirm that Agent Byrne at any time applied undue pressure on the Indians to consent to the surrender against their will. Nor is there any evidence that the Band ceded or abnegated its power of decision in favour of the Crown, thereby creating a duty on the part of the Crown to exercise that power in the best interests of the Band.

---

131 Peter Byrne, Indian Agent, to D.C. Scott, Deputy Superintendent General of Indian Affairs, June 4, 1919, NA, RG 10, vol. 7535, file 26153-1, reel C-14808 (ICC Documents, p. 219).

132 Peter Byrne, Indian Agent, to Assistant Deputy Secretary, Department of Indian Affairs, July 28, 1919, NA, RG 10, vol. 7535, file 26153-1, reel C-14808 (ICC Documents, p. 249).

133 Peter Byrne, Indian Agent, to D.C. Scott, Deputy Superintendent General of Indian Affairs, September 20, 1919, NA, RG 10, vol. 7535, file 26153-1, reel C-14808 (ICC Documents, p. 251).

When they were approached in 1919 to surrender all their interest in IR 7, members of the Sumas Band must have considered the proposed surrender on many occasions. The historical record indicates that Agent Byrne met with the band on at least three occasions and, given the importance of such a decision, it is reasonable to assume that members of the Band would have also discussed the matter among themselves in the absence of Agent Byrne. Although the Band was reluctant to surrender the reserve during these initial meetings, it is clear that Agent Byrne discussed the matter with the Chief, who then raised it again with his Band. In the end result, the Band agreed to surrender the reserve by an unanimous vote of eligible band members present at the meeting. The conduct of the Sumas Band after the surrender also suggests that its members were aware of the consequences of their decision to surrender all its interest in IR 7. Not only did the Band request the compensation agreed to for improvements to the reserve land but it also asked Agent A.O'N. Daunt in 1923 to seek payment of the outstanding balance of the purchase price.

While it is fair to say that Agent Byrne was instructed to approach the Band to determine whether it would be prepared to surrender the reserve for the benefit of the returning soldiers, there is no evidence to suggest that the Band ceded or abnegated its power to decide whether or not to surrender the land for sale. In the end result, the Band voters in attendance at the surrender meeting were unanimously in favour of the surrender and there is no direct evidence to establish that the Sumas Band lost or ceded its full power of decision to surrender its reserve.

In the light of *Apsassin*, we conclude on the basis of the evidence before us that members of the Sumas Band made a full and informed decision to surrender all their interest in IR 7 to the Crown and expressed their intention to do so by voting unanimously in favour of the surrender and, later, by signing or affixing their marks to the surrender document. The Crown had no duty, in the circumstances of this surrender, to substitute its own decision for the Band's, since the Band membership retained control over this aspect of the decision-making process.

Where a Band's Understanding Is Inadequate or the Dealings Are Tainted

In *Apsassin*, Mr Justice Gonthier, writing for the majority, concurred with McLachlin J's reasons with regard to the disposition of the issues dealing with the Crown's fiduciary duties in the surrender

context.[134] However, in considering whether the Beaver Band's surrender for sale or lease of both mineral and surface rights in 1945 had expanded upon and subsumed the earlier 1940 surrender of mineral rights for lease only, Gonthier J adopted an "intention-based approach" as the basis for determining the legal effect of dealings between aboriginal peoples and the Crown:

> An intention-based approach offers a significant advantage, in my view. As McLachlin J. observes, the law treats Aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured. . . . In my view, when determining the legal effect of dealings between Aboriginal peoples and the Crown relating to reserve lands, the *sui generis* nature of Aboriginal title requires courts to go beyond the usual restrictions imposed by the common law, in order to give effect to the true purpose of the dealings.[135]

He later added the following caveat regarding the validity of the surrender variation agreed to by the band:

> I should also add that *I would be reluctant to give effect to this surrender variation if I thought that the Band's understanding of its terms had been inadequate, or if the conduct of the Crown had somehow tainted the dealings in a manner which made it unsafe to rely on the Band's understanding and intention.* However, neither of these situations arises here. As the trial judge found, the consequences of the 1945 surrender were fully explained to the Indians by the local agent of the DIA [Department of Indian Affairs] during the negotiations. There was also substantial compliance with the technical surrender requirements embodied in s. 51 of the 1927 *Indian Act*, and as McLachlin J. concludes, the evidence amply demonstrates the valid assent of the Band members to the 1945 agreement. Moreover, by the terms of the surrender instrument, the DIA was required to act in the best interests of the Band in dealing with the mineral rights. In fact, the DIA was under a fiduciary duty to put the Band's interests first. *I therefore see nothing during the negotiations prior to the 1945 surrender, or in the terms of the surrender instrument, which would make it inappropriate to give effect to the Band's intention to surrender all their rights in*

---

[134] Gonthier J explained in his reasons for judgment in *Apsassin*, [1996] 2 CNLR 25 at 28 (SCC): "I have had the benefit of reading the reasons of my colleague, McLachlin J. While I agree with her analyses of the surrender of the surface rights in Indian Reserve 172 ("I.R. 172"), and the application of the British Columbia Limitation Act, R.S.B.C. 1979, c. 236, and with her ultimate disposition of the case, I find that I cannot agree with her conclusion that the 1945 surrender of I.R. 172 to the Crown did not include the mineral rights in the reserve."

[135] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 at 31 (SCC).

> *I.R. 172 to the Crown in trust "to sell or lease." In fact, the guiding principle that the decisions of Aboriginal peoples should be honoured and respected leads me to the opposite conclusion.*[136]

Mr Justice Gonthier's analysis is important because it stands for the principle that the autonomy of Indian bands is to be respected and honoured. On this point, he and Madam Justice McLachlin are in full agreement. If, however, a band's decision-making power has been undermined or "tainted" by the conduct of the Crown, which makes it "unsafe to rely on the Band's understanding and intention," then the band's autonomy has likewise been compromised. Given this emphasis on the band's autonomy, both Gonthier J and McLachlin J in *Apsassin* placed considerable reliance on the factual findings of the trial judge to conclude that Indian Affairs officials had fully explained the consequences of the surrender, had not attempted to influence the Band's decision, and had acted conscientiously throughout the entire process.

As the court said in *Apsassin*, the *Indian Act* was intended to strike a balance between protection and autonomy, and a decision by a band to surrender its reserve land must be respected unless that decision is "exploitative" or "if the conduct of the Crown had somehow tainted the dealings in a manner which made it unsafe to rely on the Band's understanding and intention." We can find no evidence in the chronology of events relating to the Sumas Band and the surrender of IR 7 to support the contention that the Crown, in its conduct, unduly influenced or pressured the Band to surrender. Although there is nothing in the historical record to indicate why the Band, after its repeated refusals, changed its position in favour of the surrender, we cannot conclude that this change of mind can be attributed to the conduct of any Crown officials. Without any direct evidence to the contrary, we find that Crown officials did not taint the transaction in such a way that it would be unsafe to rely on the surrender of IR 7 as an expression of the Sumas Band's true understanding and intention.

---

136 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 at 34 (SCC). Emphasis added.

Where a Band's Decision to Surrender Is Foolish or Improvident

The next issue deals with whether the Governor in Council ought to have withheld its consent to the surrender under subsection 49(4) of the 1906 *Indian Act*. Justice McLachlin's decision in *Apsassin* makes it clear that, where there is evidence of exploitation, the Crown's protective role, as set out in the *Indian Act*, provides the source of a fiduciary duty on the Crown to consider whether the band's decision to surrender is foolish, improvident, or amounts to exploitation. Where it is evident that the surrender was foolish or improvident when viewed from the perspective of the band at the time, the Crown, through the Governor in Council specifically, has a duty to override the band's decision by refusing to accept the surrender.[137]

Such a determination cannot be made in a vacuum. A determination of this issue must be made within the context of the circumstances existing at the time of surrender. In this claim, an examination of how the Sumas Band used the land on IR 7 before 1919 provides a useful starting point for determining whether the surrender was foolish or improvident. The historical evidence has established that Sumas IR 7 was valued for its heavy timber and its soil, which was "rich and . . . and suitable for agricultural purposes." Although the land did contain merchantable timber, the Band had done little work in clearing the land because of a lack of money and fears that a fire might run through the land if it did.

Speaking to the McKenna-McBride Commission in January 1915, Chief Ned told the Commissioners that his Band was interested in cultivating IR 7 in the future, and that Band members, all of whom (with only two exceptions) lived on IR 6, would take additional holdings on IR 7 "if we could clear it and sell the timber." An agreement between the Band and Mr Devoy was entered into, however, for the harvesting of the merchantable timber in January 1917. Although the Band apparently had plans to cultivate and settle on IR 7, it did not use the land extensively in the years leading to surrender.

The terms and conditions of the surrender provided that the reserve be disposed of to the Soldier Settlement Board for $80 per acre on terms most conducive to the welfare of the Band and that all moneys received from the disposition, less the amount distributed to Band members, be

---

[137] This reasoning is consistent with McLachlin J's statement in *Apsassin*, [1996] 2 CNLR 25 at 40, that the band's decision to surrender made good sense when "viewed from the perspective of the Band at the time."

placed to the Band's credit, with interest paid in the usual way. An advance of $4500 was requested and obtained from the Soldier Settlement Board, to which the Band members received an immediate per capita distribution at the time of the surrender. The balance of the purchase price was received within two months of the surrender, with 50 per cent of the proceeds being placed in the Band's trust accounts.

The Band argues that the decision to surrender was exploitative because the Crown failed to disclose that Agent Byrne believed the land to be worth $100 per acre, yet agreed to the price of $80 per acre in valuing the land with the Soldier Settlement Board, and also that the Crown must have known that the surrender would leave the Band with insufficient land for its needs. On the other hand, Canada submits that the Band has not established that the surrender was foolish, improvident, or exploitative in view of the terms of the surrender, the value received for the reserve, and the Band's limited use of the land at the time. Although Canada was prepared to acknowledge that there were varying opinions on the value of the lands on a per acre basis, counsel argued that "subsequent selling prices of the lands suggest that the consideration of $80.00 per acre paid by the Soldier Settlement Board in 1919 was fair value."[138]

Based on these facts, can it be said that the Crown breached it fiduciary duty by failing to withhold its consent to the surrender pursuant to section 49(4) of the *Indian Act* on the ground that the surrender transaction was foolish, improvident, or exploitative in the circumstances? In our view, there is insufficient evidence to establish that the surrender was foolish, improvident, or exploitative. In determining whether the Crown had a duty to withhold its own consent to the surrender, it must be borne in mind that the Band "had the right to decide whether to surrender the reserve, and its decision was to be respected."[139] Given the balance inherent in the *Indian Act* between the two extremes of autonomy and protection, it is our view that the Crown should not interfere with the Band's right to decide for itself whether to surrender the land unless it was manifestly obvious that the terms of the surrender transaction were exploitative or that the Band's decision was foolish or improvident.

---

138 Government of Canada's Written Submissions, April 23, 1996, p. 19.

139 *Apsassin*, [1996] 2 CNLR 25 at 40.

Although it is not clear what factors prompted the Band to change its views and agree to surrender its land for $80 per acre, it is not patently obvious from the evidence before us that this decision was foolish or improvident when viewed from the perspective of the Band at the time. On the one hand, it is clear that the Band did have future plans for the reserve. Yet there is also evidence that the Band was not using the reserve to any significant degree for agricultural or residential purposes at the time it was surrendered in 1919. On balance, it is plausible that the Band may have agreed to surrender the reserve because it was not contiguous to the main reserve, because it was underused, or because the Band would derive an immediate benefit from the sale by virtue of a per capita distribution of half the proceeds, with the remainder to be placed in an interest-bearing account for future use. Thus, when viewed from the perspective of the Band at the time, it may have made good sense to surrender IR 7, since it was not being actively used by the Band and because the proceeds from the sale would have benefited the Band and its members.

Assuming the Band's decision to surrender was not foolish or improvident, can it be said that the transaction was exploitative because the Crown failed to disclose that the lands might have been worth more than the $80 per acre agreed to between Agent Byrne and Mr Stacey? Although it is clear that the Sumas Band knew it was surrendering its interest in IR 7 forever, there is no evidence to indicate that the Band was informed or was aware of the conflicting interests of the Crown when it sought the surrender. Nor does the historical record suggest that the Band was consulted or involved in any sense in the negotiation of the sale price of $80 per acre.

Although these facts are not really in dispute, it is our view that Canada's failure to disclose the existence of competing interests between Indian Affairs and the Soldier Settlement Board does not have any real bearing on whether the Band intended to surrender its interest in the land and, accordingly, it is not sufficient to vitiate the Band's consent to the surrender. Nor was the purchase price of $80 per acre for IR 7 so manifestly unreasonable on the face of the transaction that it required the Governor in Council to withhold its consent to surrender.

Having said that, we are not completely satisfied that the Crown acted reasonably in trying to obtain fair compensation for the Band in exchange for the surrender of IR 7. Thus, the alleged non-disclosure could potentially give rise to a valid claim for compensation if the Crown breached

a fiduciary duty by allowing the lands to be sold for less than fair market value without the full and informed consent of the Band.

The question whether the Crown breached a fiduciary duty by allowing the lands to be sold for less than fair market value without the full and informed consent of the Band will be addressed in the next section of this report. For now, however, we must conclude that, in the absence of any evidence to the contrary, the terms of the surrender, in and of themselves, cannot be said to be exploitative. Nor is it manifestly obvious from the record that the Band's decision to surrender was foolish or improvident. Thus, the Crown, through the Governor in Council, did not breach its fiduciary duty to the Band by accepting the surrender under section 49(4) of the *Indian Act*.

Where Inadequate Compensation Is Paid for Surrendered Lands

The next issue deals with whether the Sumas Band received fair compensation for the lands surrendered to the Crown for returning veterans of the first World War. The Sumas Band submits that the Department of Indian Affairs breached its fiduciary duty by failing to consider whether the sale of IR 7 was in the best interests of the Band, and by failing to disclose to the Band the proposed details of the transaction that had been arrived at between Indian Agent Byrne and Mr Stacey on behalf of the Soldier Settlement Band. In particular, the Band was concerned that even though Agent Byrne believed that the land was worth $100 per acre, he agreed with Mr Stacey to place a value of $80 per acre on the land. Finally, the Band states that Indian Affairs failed to disclose the nature of its relationship with the Soldier Settlement Board and its interest in promoting the surrender and disposal of the Band's reserve.[140]

Although the Band argued that Agent Byrne's failure to disclose material facts renders the surrender invalid because the Band did not provide a full and informed consent to the surrender, we are convinced for reasons we have already discussed that the Band understood that it was surrendering its interest in IR 7 forever and that it understood the consequences of the surrender. Nor was the Band's decision so foolish or improvident that the Governor in Council ought to have withheld its consent to the surrender. Nevertheless, we have serious reservations about whether the Crown discharged its fiduciary duty towards the Band by failing to obtain fair market value from

---

140 Sumas Band's Written Submissions, April 16, 1996, p. 16.

the Soldier Settlement Board for the surrendered land and by allowing the land to be sold for less than fair market value without the Band's full and informed consent.

Canada submitted that it did not breach any fiduciary duty towards the Band in fulfilling the terms of the surrender because the terms of the surrender instrument simply provided that the reserve be sold to the Soldier Settlement Board for $80 per acre on such terms as Canada may deem most conducive to the welfare of the Band. The terms of the surrender, Canada argues, were met by the issuance of Letters Patent to the Board and by receipt of an advance payment from the Board of $4500 and payment of the balance of $7780 in December 1919.[141]

In light of the facts in this case, we can not agree with Canada's argument that its fiduciary duty was confined simply to fulfilling the terms of the surrender by obtaining the $80 per acre purchase price from the Soldier Settlement Board on behalf of the Band. This argument distorts the reality of the situation and attempts to gloss over the fact that Agent Byrne exercised complete control over the negotiation of the purchase price with the Board and that he did not consult with the Sumas Band or inform it that the land might be worth more than the $80 per acre agreed to by Mr Stacey and him.

In our view, the case law clearly establishes that the Department of Indian Affairs owed a fiduciary duty to the Sumas Band once it undertook to act in the best interests of the Band in the negotiation of the purchase price with the Soldier Settlement Board. While we are aware of Justice McLachlin's comment in *Apsassin* that the measure of control that Indian bands exercise over the decision to surrender negates the contention that the Crown has a duty to decide for a band where its best interests lie, the same reasoning does not apply to the present situation because there was a unilateral undertaking by Indian Affairs to enter into negotiations with the Board on the purchase price for the reserve for the benefit of the Band. Therefore, while it can be said that the Sumas Band retained control over its decision whether to surrender the reserve, the determination of purchase price and the negotiations with the Board were left solely to the discretion of Agent Byrne, who acted on behalf of the Band.

Support for this conclusion can be found in *Guerin*, where Dickson J described the source of the Crown's fiduciary obligation in these terms:

---

141 Government of Canada's Written Submissions, April 23, 1996, p. 32.

> It is true that the *sui generis* interest that the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true . . . that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. *These two aspects of Indian title go together, since the Crown's original purpose in declaring the Indians' interest to be inalienable otherwise than to the Crown was to facilitate the Crown's ability to represent the Indians in dealings with third parties.*[142]

Likewise, it will be recalled from *Apsassin* that fiduciary obligations can arise on the facts where one party possesses a power or discretion to act solely for the benefit of a party who is peculiarly vulnerable.[143]

Also in *Kruger v. The Queen*,[144] the Federal Court of Appeal considered whether the Crown owed any fiduciary obligations to the Penticton Indian Band in a situation where a portion of the band's reserve was expropriated by the Department of Transport for an airport. The Crown chose to exercise its expropriation authority rather than obtain a surrender from the band because no agreement could be reached over the proper amount of compensation that should be paid to the band for the lands taken. Writing for the majority of the Court, Urie J recognized that *Guerin* dealt only with the Crown's obligations in a specific context – namely, the surrender of Indian lands on certain terms that were changed by the Crown without consultation or approval by the Indians – but nevertheless found that the Crown owed a fiduciary duty to the band:

> When the Crown expropriated reserve lands, being Parcels A and B, there would appear to have been created the same kind of fiduciary obligation, vis-a-vis the Indians, as would have been created if their lands had been surrendered. *The precise obligation in this case was to ensure that the Indians were properly compensated for the loss of their lands as part of the obligation to deal with the land for the benefit of the Indians*, just as in the *Guerin* case, the obligation was to ensure that the terms of the lease were those agreed to by the Indians as part of the general obligation to

---

142 *Guerin*, [1985] 1 CNLR 120 at 131-32 and 136.

143 In *Apsassin*, [1996] 2 CNLR 25 at 40, McLachlin J states: "Generally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second 'peculiarly vulnerable' person. . . . The vulnerable party is in the power of the party possessing the power or discretion, who is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party." Also see *Frame v. Smith* (1987), 42 DLR (4th) 81 (SCC).

144 *Kruger v. The Queen*, [1985] 3 CNLR 15 (Fed. CA).

> them to ensure that the surrendered lands be dealt with for their use and benefit. *How they ensured that lies within the Crown's discretion as a fiduciary and so long as the discretion is exercised honestly, prudently and for the benefit of the Indians there can be no breach of duty.*[145]

This decision is significant for at least two reasons. First, it suggests that the Crown has a general fiduciary duty by virtue of its role as intermediary between Indians and third parties to take reasonable steps to ensure that proper compensation is paid for the loss of Indian lands. Second, the Court stated that the proper standard of conduct required of the Crown is not necessarily one of undivided loyalty, but one that requires it to exercise its discretion honestly, prudently, and for the benefit of the Indians. Thus, the *Kruger* and *Apsassin* decisions both suggest that the proper standard of conduct required of a fiduciary under these circumstances is "that of a man of ordinary prudence in managing his own affairs."[146]

When all the circumstances regarding the valuation of IR 7 and the determination of the purchase price are considered, it is apparent that Indian Affairs unilaterally undertook to act on behalf of the Band in discussions with the Soldier Settlement Board and that it had a corresponding duty to the Band to exercise that power or discretion with loyalty and care. It makes no difference in the present case that Indian Affairs determined the purchase price before the surrender of the reserve because the facts confirm that Agent Byrne assumed complete control over discussions with the Board and that he was instructed to "cooperate with Mr. Stacey in arriving at a fair valuation for this reserve" before discussing the prospect of a surrender with the Band.[147] In this sense, Agent Byrne was in a position to exercise power or discretion in determining the value of the Band's reserve, and the exercise of this power or discretion would, and did, affect the legal and practical interests of the Band. Accordingly, there can be no doubt that the Crown had a fiduciary duty to

---

145 *Kruger v. The Queen*, [1985] 3 CNLR 15 at 41 (Fed. CA).

146 In *Apsassin*, [1996] 2 CNLR 25 at 60, Justice McLachlin stated that in the circumstances of that case the "duty on the Crown as fiduciary was 'that of a man of ordinary prudence in managing his own affairs': *Fales v. Canada Permanent Trust Co.*, [1977] 2 SCR 302 at 315."

147 D.C. Scott, Deputy Superintendent General of Indian Affairs, to W.J. Black, Chairman, SSB, April 25, 1919, NA, RG 10, vol. 7535, file 26153-1, reel C-14808 (ICC Documents, p. 208); and W.J Black to D.C. Scott, April 26, 1919, NA, RG 10, vol. 7535, file 26153-1, reel C-14808 (ICC Documents, p. 213).

protect the best interests of the Band by taking reasonable steps to ensure that the Sumas Band received fair value for the lands it was being asked to surrender.

Did the Department of Indian Affairs, then, discharge its fiduciary duty to the Band by acting in a reasonable and prudent manner to ensure that the Sumas Band received fair compensation for the land surrendered in IR 7? Although each case must be judged on its own merits, it is worthwhile to compare the present case with the facts and circumstances in *Apsassin* and *Kruger* to determine whether the Crown discharged its fiduciary duties to the Sumas Band.

In *Apsassin*, the Court considered whether the Crown breached a fiduciary obligation to the Beaver Indian Band for selling the reserve lands for less than market value. The facts were that the band agreed to surrender its reserve to the Crown to allow the valuable agricultural land to be distributed under the *Veterans' Land Act* to returning soldiers. The terms of the surrender gave the Department of Indian Affairs the discretion to sell or lease the lands on such terms as Canada deemed most conducive to the welfare of the band. Negotiations ensued between the Department of Indian Affairs (DIA) and the Director of the *Veterans' Land Act* (DVLA), whose officials agreed that the land would be sold *en bloc* for $70,000. In the course of these negotiations, DIA obtained an appraisal that valued the land at approximately $93,160, while appraisals done by the DVLA suggested a lower value. The trial judge held that the Crown breached its fiduciary duty by selling the lands at under value, because it sold the lands for less than the value suggested by DIA's own appraisers. The trial judge stated:

> The defendant had a duty to convince the Court that it could not reasonably have expected to obtain a better price. There was no evidence as to what other offers were sought and what efforts were made to obtain a better price elsewhere. Since the onus of establishing that a fair price was in fact obtained in March 1948 has not been discharged by the defendant, I find that the latter was guilty of a breach of its fiduciary duty towards the plaintiffs in that regard.[148]

In the appeal before the Supreme Court, McLachlin J concluded that the trial judge erred in finding that the Crown breached its fiduciary duty by selling the land for $70,000. In light of the similarities between the *Apsassin* case and this inquiry, it is worthwhile to set out Justice

---

148 *Apsassin*, [1988] 14 FTR 161, 1 CNLR 73 at 139 (TD).

McLachlin's analysis in some detail to identify the relevant factors involved in a determination of this issue:

> The trial judge was correct in finding that a fiduciary involved in self-dealing, i.e. in a conflict of interest, bears the onus of demonstrating that its personal interest did not benefit from its fiduciary powers: J.C. Shepherd, *The Law of Fiduciaries* (1981), at pp. 157-159; and *A.H. Oosterhoof: Text, Cases and Commentary on the Law of Trusts* (4th ed. 1992). The Crown, facing conflicting political pressures in favour of preserving the land for the Band on the one hand, and making it available for distribution to veterans on the other, may be argued to have been in a position of conflict of interest.
>
> More problematic is the trial judge's conclusion that the Crown failed to discharge the onus of showing the price of $70,000 to be reasonable. While the DIA received a higher appraisal, there were also appraisals giving lower value to the land. In fact, there appears to have been no alternate market for the land at the time, which might be expected to make accurate appraisal difficult. The evidence reveals the price was arrived at after a course of negotiations conducted at arm's length between the DIA and DVLA.
>
> This evidence does not appear to support the trial judge's conclusion that the Crown was in breach of its fiduciary obligation to sell the land at a fair value. In finding a breach despite this evidence, the trial judge misconstrued the effect of the onus on the Crown. The Crown adduced evidence showing that the sale price lay within a range established by the appraisals. This raised a *prima facie* case that the sale was reasonable. The onus then shifted to the Bands to show it was unreasonable. The Bands did not adduce such evidence. On this state of the record, a presumption of breach of the Crown's fiduciary duty to exact a fair price cannot be based on a failure to discharge the onus upon it. I note that the trial judge made no finding as to the true value of the property, nor any finding that it was significantly greater than $70,000, deferring this to the stage of the assessment of damages.[149]

The *Kruger* case also dealt with similar issues with regard to the valuation of Indian lands and negotiations between two federal departments with competing interests. As mentioned earlier, the facts in *Kruger* dealt with the expropriation of two parcels of land within a reserve set aside for the use and benefit of the Penticton Indian Band in 1938. Later that same year, the Municipality of Penticton proposed to lease 72.56 acres of land (Parcel A) at $6.50 per acre per annum for construction of a municipal airport. When the Department of Transport (Transport) became involved, it increased the area required for the airport to 153.8 acres, but did not approve the lease

---

[149] *Apsassin*, [1996] 2 CNLR 25 at 45-46 (SCC).

arrangements, preferring instead to acquire the land outright. Negotiations proceeded between Transport and the Indian Affairs Branch (IAB) which acted on behalf of the Band. In July 1940, the Indian Agent advised that the Indians were prepared to surrender the land for lease at $10 per acre per annum for a period of 10 years. The Indians requested this amount because most of the band's hay lands and meadows used for agricultural operations would be taken. Although the Indian Commissioner for British Columbia thought that the rent was not "excessive," Transport disagreed and decided to expropriate, offering $100 per acre as compensation for the lands to be taken.

When this amount was refused by the band, Transport was granted authority by federal Order in Council (OIC) to expropriate the land on condition that negotiations continue with the band to determine the amount of compensation to be paid for the lands. The payment of $115 per acre was later authorized by OIC, which stated that the Indians agreed to accept the figure of $17,687. The expropriation became effective on February 4, 1941, and compensation was paid to and received by the band in March and April 1941.

Parcel B involved an additional 120 acres requested by the Department of National Defence for "an emergency landing field for the West Coast defense system." When Transport advised the IAB that the lands were required, the Indian Agent was instructed to discuss the matter with the Penticton Band and to cooperate as fully as possible with Transport, which later commenced work on the reserve before the land had been sold, leased, or expropriated. The band asked how much compensation it would receive, and objected to Transport's taking possession of the lands before payment. Negotiations continued and, by May 1943, Transport had two independent appraisals, which valued the land at $6,831.10 and $6,810.60, respectively. An independent appraisal done by the IAB estimated the value at $16,958.75, but this figure was also not accepted by the band which instead sought approximately $25,000 in compensation. When Transport stated that this expenditure could not be justified, another OIC authorized the expropriation of Parcel B. The expropriation was completed in February 1944.

An offer of interim compensation was refused by the band in May 1944. After protracted negotiations and discussions among members of the band whether they should go to court to determine the issue of compensation, the Indian Agent reported in January 1946 that the band agreed to accept a settlement of $15,000, to be paid immediately to avoid litigation. The Deputy Minister

of Transport advised the IAB that the offer of settlement was accepted. Although the land had already been expropriated, Agent Barber was instructed to meet with the Indians and to obtain their consent to the surrender of Parcel B. The band consented, but expressed concern that it was being asked to surrender the land when the land had already been taken through expropriation. The OIC approving the surrender stated that compensation was negotiated and was considered to be "fair and reasonable." The compensation was paid to and accepted by the band in March and April 1946.

On the question whether the lands were sold at under value, Urie JA (Stone JA concurring) found that there was no breach of fiduciary obligation by the Crown based on an alleged conflict between the two Crown departments for the following reasons: first, Department of Indian Affairs officials were articulate spokespersons for the band's interests, and, in fact, their forceful representations influenced the Department of Transport since the latter agreed to increase the compensation offered to and accepted by the band; second, Crown officials were well aware of their obligations to the band and discharged them to the best of their abilities; and, third, the band failed to discharge the onus of establishing, on a *prima facie* basis, that Indian Affairs officials had not disclosed sufficient information to the band.[150] Justice Urie held that, while the payments made to the band were a compromise, the band had independent legal advice; it was aware that it had other options, such as proceeding to Exchequer Court; and the "*payments were for sums which could be substantiated by the independent valuations received by both parties and which were determined after extensive negotiations and forceful representations on the Indians behalf. . . .*"[151]

In view of the case law, and taking into account the particular facts in this claim, we have serious reservations about whether the Crown fulfilled its fiduciary obligations to the Sumas Band. Specifically, the manner in which the purchase price was determined between Indian Agent Byrne and Mr Stacey raises doubts whether the $80 per acre agreed to between Indian Affairs and the Soldier Settlement Board represents fair market value for IR 7. In our view, the following factors confirm that the Department of Indian Affairs did not exercise its discretion in a reasonable and prudent manner when it agreed to the purchase price of $80 per acre for IR 7.

---

150 *Kruger v. The Queen*, [1985] 3 CNLR 15, at 653.

151 *Kruger v. The Queen*, [1985] 3 CNLR 15 at 654. Emphasis added.

First, the Crown was arguably in a conflict of interest because the Department of Indian Affairs was under an obligation to ensure that the Band received fair compensation for its land, whereas the Soldier Settlement Board was interested in obtaining the land for returning soldiers at the lowest price possible. In a House of Commons debate on the *Soldier Settlement Act* on June 23, 1919, Mr Meighen made it clear that the primary concern of the Crown was to promote the settlement of returning soldiers on good agricultural land to be purchased by the Board at reasonable prices:

> We first of all took the ground that the principle that should govern us throughout was the welfare of the Soldiers. First, we held that it was no assistance to a soldier to place him upon land upon which he was not likely to succeed, and no assistance to place him on good land at a reasonable price unless he were a man who was likely to succeed at that occupation [agriculture].[152]

In order to carry out the broad objective of the Act, it was in the Board's interests to purchase the land for as low a price as possible. Obviously, the Board's objective runs counter to the competing duty of the Department of Indian Affairs to obtain fair compensation for the reserve on behalf of the Band.

Second, there is absolutely no evidence to suggest that Agent Byrne or any other departmental official acted as "articulate spokespersons" for the Band or attempted in any way to obtain a higher price for the reserve than the $80 per acre agreed to by Agent Byrne. On the contrary, Agent Byrne was instructed to *cooperate* with the Soldier Settlement Board's representative, Mr Stacey, who was also a Member of Parliament. Undoubtedly, Agent Byrne felt obliged to carry out these instructions, and that is precisely what he did. Even though Agent Byrne knew that local settlers might pay up to $100 per acre for the reserve, he agreed to $80 per acre, and there is no evidence that he made any counter-offers to obtain a higher price that was more

---

[152] Canada, House of Commons, *Debates*, June 23, 1919, 3850. The fact that the Soldier Settlement Board was interested in keeping its costs as low as possible is also obvious when one considers the provisions of the *Soldier Settlement Act, 1919*, 9-10 George V, c. 71 (*Joint Book of Authorities*, tab 16). Section 7 provided that the Board may purchase lands by agreement to fulfil the purposes of the Act at "reasonable" prices, but section 12 was clear that the "valuation of any land purchased or proposed to be purchase by the Board, whether by agreement or compulsorily, shall not be enhanced merely because its value has, by reason or in consequence of settlement or settlement operations . . . become enhanced." Naturally, this provision would have a tendency to lower land values to assist the Board in fulfilling its mandate of settling soldiers on good agricultural land.

consonant with his own estimates of the reserve's value. That there were no real arm's-length negotiations at all is made clear by Mr Stacey's report to the Board, which states that he would have been prepared to offer up to $85 per acre for the land, but was able to secure Agent Byrne's agreement to $80 per acre.[153] Surely, a reasonable and prudent person managing his or her own affairs would have done something more to ensure that a fair price was paid for the land.

Third, it does not appear that Indian Affairs was even alert to its duty to protect the Band's interests in the discussions with the Soldier Settlement Board. This duty arose not only by virtue of the Crown's protective role as intermediary in the surrender process but also as a result of the unilateral undertaking by Indian Affairs to negotiate the purchase price. Under these circumstances, the Sumas Band was peculiarly vulnerable to the Crown's exercise of discretion during the negotiation process. Canada, however, asserted that "members of the Band were independently minded and very capable of making their own decisions and negotiating in favour of their own interests." In support of this assertion, Canada pointed to the Band's involvement in negotiating a deal for the sale of the timber in 1917 on condition that it would receive $1.50 per cord to cut bolts at the stump and $3.00 per cord for delivery to a certain point. Although we acknowledge the active involvement of the Band in negotiating this deal, we think Canada has overstated the case for two reasons:

1 The fact that Indian Affairs felt obliged to intervene in the same deal and to convince the Band not to sell its timber for the lower of two offers made by Mr. Devoy and Mr. Whiteside[154] serves only to confirm the Band's lack of sophistication and vulnerability in such transactions.

2 Although it is reasonable to suggest that members of the Band might have had some understanding of labour markets and the wages to be paid for cutting and hauling timber, it strains credibility to suggest that the Band would have had any real understanding of the real estate market for agricultural land, since it was not actively farming and, indeed, was prohibited by the *Indian Act* from selling its land without the Crown's intervention in the transaction. The Band's relative lack of education and sophistication with respect to land

---

153 Major E.J. Ashton, Commissioner, SSB, to W.J. Black, Chairman, SSB, July 3, 1919, no file reference available (ICC Documents, p. 222).

154 See Peter Byrne, Indian Agent, to D.C. Scott, Deputy Superintendent General of Indian Affairs, January 5, 1917, NA, RG 10, vol. 7330, vile 987/20-7-30-6, reel C-13519 (ICC Documents, pp. 144-45).

matters made it peculiarly vulnerable to the exercise of the Crown's discretion in the circumstances.

Fourth, although Agent Byrne was aware that the land might be worth $100 per acre, he took no steps to obtain an independent valuation or assessment to confirm what the market value of the land actually was. Nor is there any evidence to suggest that either he or Mr Stacey were qualified to make this valuation on their own. Even if this were the case, we would nevertheless have concerns about the independence of their opinions given the competing considerations of Indian Affairs and the Soldier Settlement Board, both of which operate as agents of the federal Crown. It is important to observe that in both the *Apsassin* and the *Kruger* decisions, the Department of Indian Affairs at least went to the trouble of obtaining independent land valuations to assist it in obtaining fair market value on behalf of the Indians. Such a step would have been eminently reasonable given the apparent conflict of interest that existed. This is not a case where the Crown can assert that the price agreed to fell within a range of values established by independent valuations of the land taken at the time, since no valuations were obtained. The *Apsassin* case can be further distinguished on the basis that there was an alternative market for the land at the time, since local settlers were apparently interested in the land, which was reputed to have good soil.[155]

Fifth, there is no evidence to suggest that Agent Byrne ever informed the Band that it might be able to obtain a higher price than $80 per acre for the reserve. In fact, it is clear from departmental correspondence that Agent Byrne made a deliberate decision to withhold this information from the Band until he and Mr Stacey had come to an agreement on the valuation. In a letter to Duncan Campbell Scott on June 4, 1919, Agent Byrne stated: "At the time of my visit I informed Mr. Stacey that I was endeavouring to obtain the consent of the Indians to the surrender of this land, and we decided not to report on the question of valuation, until the consent of the

---

[155] With respect to the valuation of IR 7, it is also noteworthy to point out that the *Soldier Settlement Act, 1919*, defines "Agriculture land" as "adaptable for agricultural purposes and the value whereof for any other purpose is not greater than its value for agricultural purposes." This raises questions whether the Soldier Settlement Board valued IR 7 only for its agricultural potential or whether Mr. Stacey took into account other potential uses of the land aside from the dominant purpose for which it was required by the Board. If IR 7 was valued only for agricultural purposes, further research should be conducted to determine whether there was merchantable timber on the land and, if so, whether this timber was factored into the valuation as a potential source of revenue or, alternatively, as a cost of clearing the land.

Indians, was if possible obtained."[156] In our view, it was quite improper for Agent Byrne to betray the trust and confidence of the Band by deliberately withholding important information about the potential value of the land and the manner in which he and Mr Stacey determined the purchase price. The evidence in this case is that the Band was never informed that $80 per acre might be less than fair market value, and it can not be said that the Band provided a full and informed consent to this purchase price, since it was deliberately kept in the dark by Mr Byrne. This was a decision that was made by Agent Byrne without consultation from the Band and without its full and informed consent.

Sixth, the Band did not have independent legal or expert advice on the value of the land, and there is no evidence that it was informed of what its options were if it chose not to accept the $80 per acre offered by the Soldier Settlement Board. Although we do not intend to suggest that independent legal or technical advice is always required for the Crown to discharge its fiduciary duties towards an Indian band, it can be an important factor in determining whether or not the band provided a full and informed consent to a surrender or some transaction entered into with the Crown or a third party.

In summary, then, we must conclude that the Crown was faced with competing interests, but that it failed to reconcile those interests in accordance with the standard required of a fiduciary. The Department of Indian Affairs owed a fiduciary duty to the Sumas Band to ensure that it was properly compensated for the loss of its lands, and the Crown failed to exercise its discretion in this transaction in a reasonable and prudent manner for the benefit of the Band.

Although it is clear that Indian Affairs did not act in a reasonable manner during the negotiation process with the Soldier Settlement Board, this is not sufficient to establish a breach of fiduciary obligation because it has not been proven that the Band suffered any damages; in other words, it remains to be determined whether the land, in fact, was worth more than the $80 per acre purchase price. If $80 per acre was the fair market value of the land in 1919, it cannot be said that the Band suffered any damages. If, however, the purchase price of $80 per acre was lower than the actual fair market value of the land, the discrepancy between these two figures would provide a valid basis for a claim to compensation under the Specific Claims Policy.

---

[156] Peter Byrne, Indian Agent, to D.C. Scott, Deputy Superintendent General of Indian Affairs, June 4, 1919, NA, RG 10, vol. 7535, file 26153-1, reel C-14808 (ICC Documents, p. 219).

The question, then, is how much was the land worth? Canada submitted that the subsequent selling prices of the lands, which were subdivided and sold to civilians between 1927 and 1930, suggests that the $80 per acre paid by the Soldier Settlement Board in 1919 represented fair market value for the lands. Canada pointed to evidence to suggest that there were varying opinions before the surrender with regard to the value of the reserve and that most of the land sold for between $30 and $75 per acre, with only 17.31 acres of the total being sold for the highest price of $125 per acre.[157] Table 1 confirms that the average sale price for the 145.08 acres sold amounted to $81.81 per acre.

We are also cognizant of the fact that there were other valuations of the land before and around the time of surrender which confuse the matter even further. For instance, Agent Byrne assessed the value of the lands at $13,000 (including $1000 in improvements) in 1916, a sum that amounts to $81.25 per acre for 160 acres of land.[158] After the surrender, Commissioner Ashton for the Soldier Settlement Board wrote to Mr Stacey on December 15, 1920, advising that Board inspectors appraised the value of the reserve at $50 per acre because it was "totally uncleared land."[159]

Although Canada is correct that the evidence about the subsequent selling prices of the land is equivocal, we are not completely satisfied that the subsequent sale prices of the land provide reliable evidence of fair market value, since the scheme of the *Soldier Settlement Act* required that the Board sell lands only for the amount that it cost the Board to acquire it. That is, the Board was generally not allowed to sell land at a profit even if it was worth more than the Board had paid for it. Section 16 of the *Soldier Settlement Act* stated that the Board may sell lands acquired by it to settlers on the condition that "the sale price shall be the cost of the parcel to the Board" or, in the case of land that was acquired by the Board as part of a larger parcel, the sale price shall be based

---

157 Government of Canada's Written Submissions, April 23, 1996, p. 19.

158 Peter Byrne, Indian Agent, to C.N. Gibbons, Secretary, Royal Commission on Indian Affairs, Victoria, BC, January 19, 1916, no file reference available (ICC Documents, p. 92).

159 Major E.J. Ashton, Commissioner, SSB, to F.B. Stacey, Member of Parliament, December 15, 1920, no file reference available (ICC Documents, p. 313).

on "the same proportion of the cost of the entire parcel or parcels so acquired. . . ."[160] Section 17(2) provided that both the cost of the land and the cost of improvements, if any, shall be considered in determining the sale price. If the Board determined that the land could not or should not be sold at cost, section 21 stated that the Board could report to the Minister and obtain approval from the Governor in Council to sell lands it had acquired for soldier settlement at any price other than it had originally paid. Therefore, if the Board paid $80 per acre to acquire IR 7, the Act required that the Board could not sell it for more than $80 per acre, whether or not the land was worth much more, unless the Governor in Council authorized the sale on other terms.

Another reason why we are not entirely satisfied that $80 per acre was fair compensation for the land is because it is unclear from the evidence whether IR 7 had any merchantable timber remaining on the land at the time of its sale to third parties. If valuable timber was transferred to the Soldier Settlement Board with the land, it stands to reason that the timber should have been reflected in the sale price of the land negotiated in 1919. Again, this approach is consistent with the fiduciary duty of Indian Affairs to exercise its discretion "honestly, prudently and for the benefit of the Indians."

The evidence does confirm that there was still some timber on the land in 1919 which would have to be cleared before farming operations could commence, but it is not clear whether all merchantable timber had been harvested and sold to Mr Devoy in the three-year period leading to the surrender. The existence of any merchantable timber on IR 7 is an important factor in determining the value of the reserve. The question is whether the timber on the land in 1919 had any value, or whether it was simply a potential clearing cost to be incurred by the Soldier Settlement Board or the settler who purchased the land. Since no evidence was put before us on whether any merchantable timber remained on the land in 1919 (which the Band could have sold or used if it remained in possession of the reserve), it is questionable whether $80 per acre represented the true market value of the land, since both the agricultural potential of the land and the value of any merchantable timber should have been taken into account.

Since the Crown did not take any steps in 1919 to obtain independent valuations of the land, as had been done in *Apsassin* and *Kruger* where the courts determined that the appropriate standard

---

160 *Soldier Settlement Act, 1919*, 9-10 George V, c. 71.

of conduct was "that of a man of ordinary prudence in managing his own affairs," we are not satisfied that the Sumas Band necessarily received fair compensation for the surrender of IR 7. As we have stated above, we believe that the Band has established that the Crown owed a fiduciary duty to ensure that the Band was properly compensated for the loss of its lands, and that the Crown failed to exercise its discretion in this transaction in a reasonable and prudent manner for the benefit of the Band.

In the final analysis, the Commission does not have sufficient evidence before it on the value of IR 7 in 1919 to be able to resolve the essential factual question, namely, did the Band suffer any damage? We therefore recommend that Canada and the Sumas Band conduct joint research to determine whether the $80 per acre paid by the Soldier Settlement Board represented fair market value in 1919 having regard to the various considerations we have identified in this report. If the studies confirm that the fair market value was higher than the $80 per acre obtained by the Band, it is our view that the Band is entitled to be compensated for any such discrepancy. Any compensation owed to the Band would be a matter of negotiation between the parties.

ISSUE 2(A) UNDUE INFLUENCE AND DURESS

Did the Crown or its agents exercise undue influence/duress over the members of the Band in order to obtain the surrender?

In our review of this claim, we have determined that the common law doctrines of undue influence and duress, which typically arise in dealing with the sufficiency of consent in contractual situations, do not strictly apply when considering whether there has been a valid surrender under the terms of the *Indian Act*. That is not to say, however, that these concepts do not have any relevance to the question whether the Crown has breached its fiduciary obligations towards the Band as a result of the manner in which the surrender was obtained.

This point was made by Killeen J in *Chippewas of Kettle and Stony Point v. Canada*,[161] where he refused to apply contract principles to determine the validity of a 1927 surrender of reserve lands. With respect to the doctrine of unconscionability, for example, he noted as follows:

---

161 *Chippewas of Kettle and Stony Point v. Canada* (1995), 24 OR (3d) 654 (Gen. Div.).

> Unconscionability is an equity doctrine which addresses the fairness of a bargain . . . the existence of a fair bargain is not a condition precedent to the exercise of the surrender under s. 49 of the Act or to the acceptance of a surrender by the Governor in Council thereunder. *Any finding of unconscionable conduct under the facts of this case cannot affect the validity of the Order in Council; rather such a finding or findings must surely go to the Band's other claim for breach of fiduciary duty.*
>
> It is dangerous to attempt to inject doctrines of the common law or equity into a situation where the *Royal Proclamation* and the *Indian Act* have created a unique regime for the protection of the Indian peoples. As I have said above, the best that can be said about the concept of unconscionability, for this case is that it may provide some aid or comfort for the band on the question of fiduciary duty.[162]

Killeen J's remarks concerning the applicability of the doctrine of economic duress were of a similar tenor:

> As I have said, economic duress is a contract doctrine which will, in appropriate but carefully circumscribed circumstances, avoid a contract obligation . . . This doctrine cannot apply to this case because there is no contract present to which it may be logically applied. As I have already said, the Band is claiming the benefit of the doctrine but the Band was not a direct party to any contract which would attract the doctrine. There is no warrant for injecting a narrow contract doctrine in the interstices of the *Indian Act*.[163]

At the Court of Appeal, Laskin JA similarly concluded:

> . . . what then of the cash payments, which, in the words of the motions judge, had "an odour of moral failure about them"? In my view, there is no evidence to suggest that these cash payments, in the words of McLachlin J., vitiated the "true consent" or the "free and informed consent" of the Band or, in the words of Gonthier J., "made it unsafe to rely on the Band's understanding and intention." In keeping with *Apsassin*, the decision of the Band to sell should be honoured. Therefore, like Killeen J., I am satisfied that there is no genuine issue for trial on whether the cash payments invalidated the surrender. I would dismiss the Band's second ground of appeal.
>
> *I add, however, that the cash payments or alleged "bribe" and consequent exploitation or "tainted dealings" may afford grounds for the Band to make out a case of breach of fiduciary duty against the Crown.* As the parties have recognized,

---

162 *Chippewas of Kettle and Stony Point v. Canada* (1995), 24 OR (3d) 654 at 698 (Gen. Div.). Emphasis added.

163 *Chippewas of Kettle and Stony Point v. Canada* (1995), 24 OR (3d) 654 at 699 (Gen. Div).

> this is an issue for trial. The same may be said of the Band's contention that the sale to Crawford was improvident, he having immediately "flipped" the land for nearly three times the purchase price. . . .[164]

Recent case law therefore suggests that the concepts of undue influence and economic duress cannot be read into the four corners of the *Indian Act* which set out special procedural requirements governing the surrender of Indian reserve lands. Thus, where there has been technical compliance with the surrender provisions of the *Indian Act*, it follows that the Indian interest in the reserve has been extinguished by operation of the statute. It is, nevertheless, relevant to consider whether the Crown procured the surrender in a manner that violated its trustlike responsibilities owed to the band, even though the surrender is valid in a technical sense since it complied with the surrender provisions of the *Indian Act*.

The issue of Crown conduct has been explored in the context of determining whether or not the Sumas Band provided its free and informed consent to the surrender of IR 7. Given our conclusion that there was no evidence of tainted dealings on the part of the Crown which makes it unsafe to rely on the surrender as an expression of the Sumas Band's understanding and intention, it is not necessary to review again those same facts in any considerable detail to determine whether the Crown's conduct amounts to undue influence or duress. As we stated above, there was no direct evidence that the Crown applied any undue influence or duress on the Sumas Band in the process leading up to the surrender of IR 7. Although the evidence does indicate that the Crown was unable to secure a surrender the first time it approached the Band and was persistent in its endeavour to alienate the reserve lands from the Band, there is no warrant for concluding that any of this conduct amounted to "undue" influence or pressure on the Band to surrender its land. At the end of the day, the Band was free to make the decision and the case law requires that we respect and honour the decisions of the Band unless there is evidence of tainted dealings with Crown officials which make it unsafe to rely on the Band's decision as a true expression of its understanding and intention.

---

[164] *Chippewas of Kettle and Stony Point v. Canada* (1997), 31 OR (3d) 97 at 106 (CA). Emphasis added.

ISSUE 2(B) ADVANCE ON THE PURCHASE PRICE FOR DISTRIBUTION TO BAND MEMBERS

Is the Crown's receipt of an advance on the purchase price of reserve land prior to the completion of the surrender contrary to the provisions of the *Indian Act*?

This issue involves the interpretation to be placed on section 89(1) of the 1906 *Indian Act*.[165] By amendment to the 1906 *Indian Act*, Parliament authorized payment of up to 50 per cent of the proceeds from the sale of surrendered lands to be distributed to the Indians at the time of surrender. The previous version of the *Indian Act* allowed a maximum per capita distribution of only 10 per cent of the sale proceeds to the band. Section 89(1) states, in part:

> With the exception of such sum not exceeding fifty per centum of the proceeds of any land, and not exceeding ten per centum of the proceeds of any timber or other property, as is agreed at the time of surrender to be paid to the members of the band interested therein . . .

Counsel for the Sumas Band submitted that Indian Affairs officials violated section 89(1) when they decided for themselves that an advance on purchase funds would be required to induce the Band into surrendering IR 7. More specifically, it was argued that section 89(1) "does not permit the Department of Indian Affairs to unilaterally decide that an advance on purchase funds should be provided to Band members. The terms of this provision are designed to prevent an advance of funds being used as an inducement to Band members to agree to a surrender."[166] Canada, however, submits that rather than preventing the Crown from using the proceeds of sale as an inducement to Band members to agree to a surrender, this amendment was passed specifically to provide the Crown with this power.[167]

When the proposed amendment was debated in the House of Commons on June 15, 1906, Frank Oliver, then Minister of the Interior and Superintendent General of Indian Affairs, was quite candid in explaining the underlying rationale for the amendment:

---

165 As amended by SC 1906, c. 20, s. 1.

166 Sumas Band's Written Submissions, April 16, 1996, p. 20.

167 Government of Canada's Written Submissions, April 23, 1996, p. 28.

> This Bill contains only one section and has only one object. It is simply to change the amount of the immediate and direct payment that may be made to Indians upon the surrender of their lands. At the present time Indians on surrendering their lands are only entitled to receive ten per cent of the purchase price either in cash or other value. This we find, in practice, is very little inducement to them to deal for their lands and we find that there is a very considerable difficulty in securing their assent to any surrender. Some weeks ago, when the House was considering the estimates of the Indian Department, it was brought to the attention of the House by several members, especially from the Northwest, that there was a great and pressing need of effort being made to secure the utilization of the large areas of land held by Indians in their reserves without these reserves being of any value to the Indians and being a detriment to the settlers and to the prosperity and progress of the surrounding country.
>
> . . .
>
> We do not wish to advance fifty per cent of the purchase price unless we have to do so in order to procure a sale of the land. We recognize that it is very much better that the Indians should have the money in fund and only receive the interest from year to year. But where it is very desirable in the interest of a growing town, for instance, to secure lands for the purpose of cultivation, and to remove the Indians from them, the urgency of the case must to some extent govern the action of the department.[168]

There can be no doubt that this provision was intended to have a specific effect, namely, to give Crown officials the authority to offer a greater incentive to bands to surrender their reserve lands.

The fact that Parliament passed an amendment whose primary purpose was to induce Indian bands into surrendering the remaining lands they had as reserves in exchange for a one-time cash payment is morally and ethically objectionable when judged by today's standards. Nevertheless, the authority of the federal government to unilaterally pass such legislation in 1906 is beyond question owing to the doctrine of parliamentary supremacy.[169]

---

[168] Canada, House of Commons, *Debates*, June 15, 1906, 5422 and 5434 (Frank Oliver) (ICC Exhibit 3).

[169] Prior to the enactment of section 35(1) of the *Constitution Act, 1982*, which provided for constitutional recognition and protection of "existing" aboriginal and treaty rights, the federal government had full authority to enact legislation which extinguished or infringed upon aboriginal or treaty rights providing that there was a clear and plain intention to do so: see *R. v. Sparrow*, 1990 1 SCR 1075, [1990] 3 CNLR 160. For example, in *R. v. Horseman*, [1990] 3 CNLR 95 at 105 (SCC), Cory J. held that the federal Crown had the authority to extinguish treaty rights to hunt for commercial purposes when it enacted the Alberta *Natural Resources Transfer Agreement, 1930*:

> . . . although it might well be politically and morally unacceptable in today's climate to take such a step as that set out in the 1930 Agreement without consultation with and concurrence of the Native

Although it is clear that Parliament had the legislative authority to allow 50 per cent of the surrender proceeds to be paid to band members, it is still necessary to scrutinize the circumstances in which a cash payment is used in surrender cases because the abuse of this authority and discretion by overzealous Crown officials can result in a breach of fiduciary duty towards the band in question. In the *Kahkewistahaw Report*, the Commission stated that it is necessary to consider whether the Crown attempted to reconcile its competing responsibilities:

> We recognize that the Crown was and is constantly faced with conflicting interests since it has the dual and concurrent responsibilities of representing the interests of both the general public and Indians. However, the *fact* that the Crown has conflicting duties in a given case does not necessarily mean that the Crown has breached its fiduciary obligations to the First Nation involved. Rather it is the manner in which the Crown *manages* that conflict that determines whether the Crown has fulfilled its fiduciary obligations.[170]

In the case of the 1907 Kahkewistahaw surrender, the Commission concluded that Indian Affairs officials breached their fiduciary obligations to the band by offering cash inducements in the middle of a harsh prairie winter to people who were "particularly vulnerable because [band] members were poor, starving, illiterate, and . . . without effective leadership."[171] In that case, the cash inducement was an important factor which contributed to the Commission finding that the Crown did not properly manage its fiduciary responsibilities toward the Kahkewistahaw Band.

In view of the above, the payment of up to 50 per cent of the proceeds immediately following a surrender of land by a band cannot, in and of itself, be said to be unlawful or a breach of the Crown's fiduciary obligations. A per capita distribution payment could, however, amount to a breach of the Crown's fiduciary duty if these payments were used by Crown officials to exploit or apply undue pressure on the band to surrender its land. Thus, the issue of exploitation or tainted

---

peoples affected, *nonetheless the power of the Federal Government to unilaterally make such a modification is unquestioned* and has not been challenged in this case.

170 ICC, *Kahkewistahaw First Nation Report on the 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), 108.

171 ICC, *Kahkewistahaw First Nation Report on the 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), 107.

dealings is relevant in determining whether or not the Crown fulfilled its fiduciary obligation concerning these payments.

Based on the evidence before us, however, it has not been established that there were any tainted dealings involving the Department of Indian Affairs, nor was any undue influence or duress applied to the Sumas Band in seeking the surrender of IR 7. Since the advance payments were lawful and there is no evidence of tainted dealings on the part of the Crown, we cannot find any breach of the Crown's fiduciary obligation concerning the advance on the purchase price.

ISSUE 3 ADVANCE ON THE PURCHASE PRICE BEFORE THE SURRENDER

Is the Crown's receipt of an advance of the purchase price of reserve land prior to the completion of the surrender contrary to the Crown's fiduciary obligations, if any, with regard to the management of reserve or surrendered land?

The Sumas Band argues that the receipt of $4500 by the Department of Indian Affairs and payment of the money to the Band immediately on surrender, but prior to the Governor in Council accepting the surrender, fettered the ability of the Governor in Council to render an objective opinion concerning the acceptability of the surrender under subsection 49(4) of the Act. The question, then, is whether the discretion of the Governor in Council was in fact fettered because of the advance payment on the purchase price.

As we have stated previously in this report and in our report on the 1907 Kahkewistahaw Surrender, after a band has provided its consent to surrender reserve land, the Governor in Council must also accept the surrender pursuant to subsection 49(4) of the *Indian Act* before there can be a valid surrender of reserve land in a purely technical sense. In exercising this discretion, the Crown has a superimposed fiduciary obligation on top of the legislative regime to prevent a foolish, improvident, or exploitative bargain. The assessment whether or not a surrender results in an exploitative bargain when viewed from the perspective of the Band at the time, therefore, takes into account all the circumstances operating at the time the Crown takes the surrender.

Viewed in this light, the Governor in Council must refuse to consent to a surrender where the band's decision was foolish, improvident, or would amount to exploitation. In arriving at this

decision, whether or not the Crown received and distributed moneys in advance of accepting the surrender is perhaps one indicia to be considered. The receipt and distribution of moneys, however, cannot provide the sole basis on which to rest a finding that the Crown breached its fiduciary duty to prevent an exploitative transaction.

For reasons we have already discussed above, there is insufficient evidence to establish that the Sumas Band's decision to surrender was foolish, improvident, or otherwise exploitative. Therefore, we must conclude that the Governor in Council did not breach its fiduciary duty by accepting the surrender under section 49(4) of the *Indian Act*.

ISSUE 4 FIDUCIARY OBLIGATIONS AFTER THE SURRENDER

If the surrender is valid:

(a) Did the Crown fulfil their fiduciary obligations to the Band subsequent to the surrender? and/or

(b) Did the subsequent disposition of the lands comprising IR 7 violate the terms of the surrender or the applicable legislation or constitute a breach of the Crown's fiduciary obligation to the Band?

The Sumas Band submitted that the Crown breached the terms of the surrender and its fiduciary obligations to the Band in four distinct ways by

- paying compensation for improvements out of the purchase price of the reserve without authorization;
- reducing the purchase price of the reserve and granting the SSB a rebate without authorization;
- failing to obtain a return of the lands for the Band when they were offered by the SSB;

- allowing a disposition of the reserve lands to persons other than returning veterans under the *Soldier Settlement Act* contrary to the terms of the surrender and the *Soldier Settlement Act*.[172]

With respect to the first two allegations, Canada has offered to negotiate compensation under the Specific Claims Policy for the claim relating to the reimbursement of money to the Soldier Settlement Board out of the purchase price and has agreed to reconsider the Band's claim for improvements paid by the Crown out of the purchase price on receipt of the Band's trust accounts confirming such payments.[173] Therefore, by agreement of the parties, there are really only two post-surrender issues before the Commission for consideration.

The first issue is whether the Crown had a statutory or fiduciary obligation to return the land to the Band when it was offered by the Soldier Settlement Board. The Band submits that the Crown had clear knowledge that the Band had inadequate reserve lands for its needs. Therefore, the Crown ought to have obtained these lands for the benefit of the Band when it became clear that the lands were not required for returning soldiers as originally intended.

In our view, the Crown did not have an obligation to obtain these lands for the Band when they were offered by the Soldier Settlement Board. The surrender document signed by the Chief and principal men of the reserve is clear that an absolute and unqualified surrender was provided to the Board for $80 per acre. There was no right of reversion in the Band, and a transfer and alienation of title to the reserve was completed when the terms of the surrender were satisfied by payment of the purchase price by the Board, acceptance of the advance and balance of proceeds by the Band, and issuance of the Letters Patent to the Board. In *Apsassin,* Madam Justice McLachlin rejected the argument that the Crown had a continuing fiduciary obligation, on the ground that there was no real transfer of lands from Indian Affairs to the Director of the *Veterans' Land Act* (DVLA), but merely an administrative allocation within the Crown:

> *Although the transfer was from one Crown entity to another, it remained a transfer and an alienation of title.* First, the transfer converted the Band's interest from a

---

172 Sumas Band's Written Submissions, April 16, 1996, p. 21.

173 Government of Canada's Written Submissions, April 23, 1996, p. 32.

> property interest into a sum of money, suggesting alienation. Second, the continuing fiduciary duty proposed for the DVLA is problematic from a practical point of view. Any duty would have applied, at least in theory, both to the mineral rights and the surface rights. Each sale to a veteran would have required the DVLA to consider not only those matters he was entitled to consider under his Act, but sometimes conflicting matters under the *Indian Act*. This would have made the sale in 1948 pointless from the DVLA's point of view and have rendered it impossible to administer. Moreover, it is not clear that the DVLA had any knowledge of the fiduciary obligations which bound the DIA. In fact, the DVLA and the DIA acted at arms length throughout, as was appropriate given the different interests they represented and the different mandates of their statutes. *In summary, the crystallization of the property interest into a monetary sum and the practical considerations negating a duty in the DVLA toward the Band negate the suggestion that the 1948 transfer changed nothing and that the real alienation came later.*[174]

Although IR 7 was intended to be surrendered specifically for soldier settlement, by the time it became known that the land would not be used for this purpose the reserve had already been alienated. There is no evidence to suggest that the surrender was conditional upon the sale of the lands to returning soldiers. Once the lands were transferred from the Department of Indian Affairs to the administration and control of the Soldier Settlement Board, the former no longer had any duties with respect to the land unless it had an ongoing fiduciary obligation to seek the return of the land.

In *Apsassin*, Justice McLachlin established that in cases of mistake, error, or fraud on the part of the government in the alienation of reserve lands, the Crown does have a fiduciary obligation to cancel the wrongful alienation pursuant to section 64 of the *Indian Act*. Whether or not the Crown had a fiduciary obligation in this case to return IR 7 to the Sumas Band depends on the interpretation placed on *Apsassin*. It appears from that case that what the Crown is required to "fix" are situations of "inadvertent" conveyance. In this case, the alienation and transfer of Sumas IR 7 cannot be construed as an inadvertent surrender, since the conveyance to the Soldier Settlement Board was intentional. Furthermore, the surrender was absolute and unconditional. Thus, the Crown did not have a post-surrender fiduciary obligation to return the land to the Band when it was offered by the Soldier Settlement Board.

---

[174] *Apsassin*, [1996] 2 CNLR 25 at 61-62. Emphasis added.

The final issue is whether the Crown was in breach of any legislation, the terms of the surrender, or its fiduciary duty in acquiescing to the Board's disposal of the land to persons other than returning veterans. With respect to the *Indian Act*, section 51 states that surrendered reserve land "shall be managed, leased and sold as the Governor in Council directs, subject to the conditions of the surrender and the provisions of this Part." The evidence confirms that there was compliance with the terms of the surrender setting the purchase price at $80 per acre and the Order in Council dated December 1, 1919, providing for the transfer of 153.5 acres to the Soldier Settlement Board on condition that the balance of the purchase price would be paid on transfer of title. Therefore, the reserve lands were disposed of in accordance with section 51 of the *Indian Act*.

The Band also submits that the Crown violated section 10 of the *Soldier Settlement Act*, which states that the Board may acquire Indian lands by purchase "upon terms not inconsistent with those of the release or surrender," because "the surrender stipulated that the Reserve was to be disposed of on the basis of 153.5 acres at a price of $80.00 per acre."[175] Although the entire purchase price of $12,280 was initially paid, the Band submits that section 10 was violated when the terms of the surrender were altered as a result of the Board requesting and receiving a refund of $1088 on the purchase price. Furthermore, the Band submits that the Soldier Settlement Board violated the Act when it sold the land to private individuals, because it had the authority to sell the lands only to "settlers" as defined in section 2(f).

In our view, there was no violation of the *Soldier Settlement Act*. First, we are not convinced that the rebate of $1088 to the Board amounted to an alteration of the terms of the surrender. Rather, this is more properly characterized as an unauthorized payment of moneys out of the Band's trust accounts for which Canada is accountable. On this point, Canada has already agreed to enter into compensation negotiations with the Sumas Band for the amount reimbursed to the Board in 1923 for the river and road allowance within IR 7. Second, although it is not clear whether the Board obtained the requisite authority from the Governor in Council to sell the lands to private individuals as required by section 21 of the *Soldier Settlement Act*, Indian Affairs did not have any continuing obligation with respect to the land since there had already been a complete transfer and alienation

---

175 Sumas Band's Written Submissions, April 16, 1996, p. 22.

of the reserve land to the Board by the time it became known that the lands would not be sold to returning soldiers.

ISSUE 5 ONUS OF PROOF

If the evidence is inconclusive on any previous issues, which party has the onus of proof?

In view of our conclusions above, it is not necessary for the Commission to determine any of the issues in this inquiry based on arguments related to which party bears the onus of proof.

PART V

CONCLUSIONS AND RECOMMENDATION

We have been asked to inquire into and report on whether the Government of Canada owes an outstanding lawful obligation to the Sumas Indian Band. Based on the facts and arguments presented by counsel on behalf of the parties, we have concluded that the surrender of IR 7 by the Sumas Indian Band in 1919 was valid. With respect to the Band's allegations that Canada breached its fiduciary obligations in relation to the surrender, we have concluded that there was no such breach because the Sumas Band made a full and informed decision to surrender the reserve and there were no tainted dealings on the part of the Crown which would make it unsafe to rely upon the surrender as an expression of the Band's understanding and intention. Nor did the Governor in Council have a fiduciary obligation to withhold consent to the surrender under subsection 49(4) of the 1906 *Indian Act* because there was no evidence that the Band's decision to surrender was foolish or improvident, or that the surrender amounted to an exploitative transaction.

The Band also submitted that the Crown breached the terms of the surrender and its post-surrender fiduciary obligations by: (1) paying compensation for improvements out of the purchase price of the reserve without authorization; (2) reducing the purchase price of the reserve and granting the Soldier Settlement Board a rebate without authorization; (3) failing to obtain a return of the lands for the Band when they were offered by the Board; and (4) allowing a disposition of the reserve lands to persons other than returning veterans under the *Soldier Settlement Act,* contrary to the terms of the surrender and the *Soldier Settlement Act*. Since Canada has offered to negotiate compensation under the Specific Claims Policy for the claim relating to the reimbursement of money to the Soldier Settlement Board and has agreed to reconsider the Band's claim for the improvements paid by the Crown out of the purchase price without authorization, there are really only two post-surrender issues before the Commission for consideration. On these latter two issues, we conclude that the Crown did not have an obligation to reacquire the lands on behalf of the Band when they were offered by the Soldier Settlement Board, and that the terms of surrender and the *Soldier Settlement Act* were not violated when Indian Affairs returned a portion of the purchase price to the Board without the consent of the Band. Although Canada has an obligation, which it has acknowledged, to negotiate compensation for the money refunded to the Soldier Settlement Board

without the Band's authority, the Crown's decision to refund a portion of the purchase price cannot invalidate the entire surrender transaction.

In summary, although we have concluded that there was no breach of the Crown's statutory and fiduciary obligations in this case, we are not completely satisfied that the Crown acted reasonably in trying to obtain fair compensation for the Band in exchange for the surrender of IR 7. When all of the surrounding circumstances are considered, it is clear that the Department of Indian Affairs owed a fiduciary duty to the Sumas Band to ensure that it was properly compensated for the loss of its lands and the Crown failed to exercise its discretion in this transaction in a reasonable and prudent manner for the benefit of the Band. Although it is clear that Indian Affairs did not act in a reasonable manner during the negotiation process with the Soldier Settlement Board, this is not sufficient to establish that there has been a breach of fiduciary obligation. At this point, it has not been proven that the Band suffered any damages, because there is insufficient evidence before us to establish that the land was worth more than the $80 per acre purchase price.

RECOMMENDATION

Based on a thorough consideration of the facts and law in relation to this claim, we find that Canada does not owe an outstanding lawful obligation to the Sumas Indian Band. However, we do have reservations about whether the Sumas Band was properly compensated for the loss of IR 7 in 1919. Therefore, we recommend to the parties:

> **That the Sumas Indian Band and Canada conduct joint research to determine whether fair market value was paid for IR 7 in 1919 having regard to the various considerations we have identified in this report. If the studies confirm that the fair market value was higher than the $80.00 per acre obtained by the Band, it is our view that the Band is entitled to be compensated for any such discrepancy. Any compensation owed to the Band would be a matter of negotiation between the parties.**

FOR THE INDIAN CLAIMS COMMISSION

Daniel J. Bellegarde
Commission Co-Chair

Carole T. Corcoran
Commissioner

Dated this 29th day of August, 1997

APPENDIX A

SUMAS INDIAN BAND INQUIRY

1	Request that Commission conduct inquiry	March 10, 1995
2	Planning conference	June 27, 1995
3	Decision to conduct inquiry	September 22, 1995
4	Notices sent to parties	September 25, 1995

5 Community session and oral submissions

A community session was combined with the hearing of oral submissions and held on April 29, 1996, on the Sumas Indian Reserve. The Commission heard oral testimony from elders Hugh Kelly and Ray Silver.

The Commission also heard oral submissions from legal counsel from the Sumas Indian Band and Canada.

6 Content of the formal record

The formal record for the Sumas Indian Band Inquiry into the Surrender of IR 7 consists of the following materials:

- 5 exhibits tendered during the inquiry, including the documentary record (1 volume of documents with annotated index)
- written submissions from counsel for the Sumas Indian Band and counsel for Canada
- joint authorities and supplemental authorities submitted by counsel for Canada with their written submissions
- transcripts from community session and oral submissions (1 volume)

The Report of the Commission and letters of transmittal to the parties will complete the formal record of this Inquiry.